(1) Supreme Court, U.S.
FILED

992036 JUN 19 2000

OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas Marcelle
Counsel of Record
71 Devonshire Drive
Slingerlands, NY 12159
Tel.: (518) 475-0806

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

June 16, 2000

116pp

QUESTIONS PRESENTED

1. Whether a public school that permits speakers to use its facilities after school hours to instruct "in any branch of education, learning or the arts," to "benefit the welfare of the community," and to "promote the morals of children," but forbids speakers whose speech it deems to be too religious from using its facilities, engages in viewpoint discrimination in violation of the Free Speech Clause of the United States Constitution?

2. Whether a governmental official's determination whether speech is "a discussion of morals from a religious viewpoint" (which is deemed to be permissible speech) or is "religious instruction" (which is deemed to be impermissible speech) unconstitutionally entangles the state with religion in violation of the Establishment Clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS

The Petitioners are the Good News Club, Andrea Fournier, and Darleen Fournier. The Good News Club is an unincorporated association, which has no parent or subsidiary companies.

Respondent is Milford Central School, a public school organized under the laws of the State of New York.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities vi

Table of Appendices viii

Opinions Below 1

Statement of Jurisdiction 1

Relevant Statutes and Regulations 2

Statement of the Case 3

A. The Facts of the Case 3

1. Milford's Policy for Community Use 3

2. The Purpose of the Good News Club ... 4

3. Good News Club Application to use Milford Facilities 5

B. The Courts Below 5

Reasons for Granting the Petition 8

I. The Decision of the Second Circuit Conflicts with Decisions of the Eighth, Tenth, and Ninth Circuit Courts Over the Proper Application of the *Lamb's Chapel* standard to Religious Speech 9

A. A direct conflict exists between the Second and Eighth Circuits regarding whether a school district that allows use of its facilities to youth groups to speak on moral issues may discriminate against youth groups that seek to discuss the same topic from a religious viewpoint 10

B. There is a direct conflict between the Second Circuit and the Tenth Circuit as to whether a government forum can exclude moral instruction from a religious viewpoint when its permits others kinds of moral instruction .. 11

C. The Second and Fifth Circuits conflict with the Ninth Circuit over the proper application of *Lamb's Chapel* to speech that involves prayer 14

II. The Decision of the Second Circuit Conflicts with this Court's Decisions in *Lamb's Chapel v. Center Moriches School Dist.*, 515 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), which Prohibit Viewpoint Discrimination Against Religious Speakers 16

III. The Decision of the Second Circuit Conflicts with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) by Requiring Government Officials to Scrutinize and Classify Religious Speech and Thereby Entangling Government with Religion in an Unconstitutional Manner 20

IV. Summary Reversal Is Appropriate 21

Conclusion 21

TABLE OF AUTHORITIES

Cases

Bronx Household of Faith v. School District No. 10, 127 F.3d 207 (1997) 12,15-16

Campbell v. St. Tammany's School Board, 206 F.3d 482 (5th Cir. 2000) 15

Cantwell v. Connecticut, 310 U.S. 296 (1940)..... 21

Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996) 8,11-14

Culbertson v. Oakridge School Dist., No. 99-35165 (9th Cir. argued March 2000, decision pending) 16

Gentala v. City of Tucson, ___ F.3d ___ (Nos. 97-17062, 97-1069, 9th Cir. April 20, 2000) 14,15

Good *News Club v. Milford Central School*, 202 F.3d 503 (2nd Cir. 2000) ..... *passim*

Good News/Good Sports Club v. School District of Ladue, 28 F.3d 1501 (8th Cir. 1994)..... 6-8, 10-11

Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) 7-9, 11, 14-18, 21-22

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995)..... 9, 15-16,18-22

Widmar v. Vincent, 454 U.S. 263 (1981)..... 9,20-21

Constitutions, Statutes, Rules, and Polices

U.S. CONST. AMEND I ..... *passim*

28 U.S.C. §1254(1) 1

42 U.S.C. §1983 6

Milford Central School's Policy of Community Use of School Facilities ..... *passim*

TABLE OF APPENDICES

A. Second Circuit Court of Appeals Opinion in *Good News Club, et al. v. Milford Central School*, 202 F.3d 502 (2nd Cir. 2000) 1-28

B. *Good News Club, et al. v. Milford Central School*, Order Denying Petition for Panel Rehearing and Petition for Rehearing *en banc*, dated March 21, 2000 1-2

C. United States District Court for the Northern District of New York in *Good News Club, et al. v. Milford Central School*, No. 97-cv-0302, October 23, 1998 1-33

D. Policy of the Milford Central School 1-3

E. Petitioners' (Good News Club, et al.) Rule 7(f) Statement in *Good News Club, et al. v. Milford Central School*, No. 97-cv-0302 (U.S. Dist. Ct. N. Dist. N.Y.) 1-5

F. Respondent's (Milford Central School's) Rule 7(f) Statement in *Good News Club, et al. v. Milford Central School*, No. 97-cv-0302 (U.S. Dist. Ct. N. Dist. N.Y.) 1-4

G. Petitioners' Response to Respondent's (Milford Central School's) Rule 7(f) Statement in *Good News Club, et al. v. Milford Central School*, No. 97-cv-0302 (U.S. Dist. Ct. N. Dist. N.Y.) 1-4

H. Affidavit of Steve Fournier filed in *Good News Club, et al. v. Milford Central School*, No. 97-cv-0302 (U.S. Dist. Ct. N. Dist. N.Y.), dated July 28, 1998.. 1-6

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Good News Club, Andrea Fournier, and Darleen Fournier, respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the Court of Appeals' holding in *Good News Club v. Milford Central School*, 202 F.3d 503 (2000), that Respondent may, without violating the First Amendment, open its facilities to the public for "the purpose of instruction in any branch of education, learning or the arts," but exclude members of the public who wish to engage in instruction "for religious purposes."

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, *The Good News Club v. Milford Central School*, is reported at 202 F.3d 502 (2nd Cir. 2000) and appears in Appendix A. The opinion of the United States District Court for the Northern District of New York is reported at 21 F. Supp 2d 147 (N.D.N.Y. 1998) and appears in Appendix C.

STATEMENT OF JURISDICTION

The petitioners seek review by writ of certiorari from the decision of the Second Circuit Court of Appeals entered February 3, 2000. The Second Circuit denied a timely petition for rehearing on March 21, 2000. *See* Appendix B. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND REGULATIONS

The relevant portions of the Milford Community Use of School Facilities are as follows (the entire text of the Policy appears in the Appendix D):

> The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes:
>
> I. For the purpose of instruction in any branch of education, learning or the arts.
>
> [Paragraph 2 is omitted]
>
> III. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.
>
> [Paragraphs 4-7 are omitted]
>
> Use for Nonreligious Purpose: School premises shall not be used by any individual or organization for religious purposes. (Emphasis in original).

STATEMENT OF THE CASE

A. The Facts of the Case[1]

1. Milford's Policy for Community Use of its Facilities

This case is about discrimination in a small upstate New York community called Milford. The public school there, Milford Central School ("Milford"),[2] has opened its facilities for use by speakers for a host of purposes, but has shut its doors to those speakers with "religious purposes."

Milford has adopted a formal policy that governs use of its facilities by community groups. There are two sweeping provisions that are relevant to this case.

The policy's first provision opens the school to community speakers on an incalculable number of subjects. Speakers may use the school for "the purpose of instruction in any branch of education, learning or the arts." Milford's Superintendent Peter Livshin testified that this provision permits speakers to teach children moral values from secular literature like Aesop's Fables.

---

[1] The parties stipulated that there was no material dispute of fact. Petitioners have provided in the appendix (1) GNC's statement of undisputed facts, Appendix E, (2) Milford's statement of undisputed facts, Appendix F, and (3) GNC's response to Milford's statement. Appendix G. Milford chose not to submit a response to GNC's statement of undisputed facts.

[2] Milford has a small single school building that houses all grades K-12.

Milford's policy also opens its facilities for "social and civic meetings, entertainment events, and other uses pertaining to the welfare of the community." Milford admits that pursuant to this provision community groups are welcome to utilize its facilities to "promote the moral and character development of children." Milford's Brief before the Second Circuit at p. 9. Moreover, Superintendent Livshin testified that the Boy Scouts may use school facilities to influence children's spiritual development.[3]

Although it seems that Milford's policy has thrown open the schoolhouse gate for after hours use by all speakers, there is one barrier to entry -- a speaker may not have a religious purpose. Milford's policy starkly and simply states that "School premises shall not be used by any individual or organization for religious purposes."

2. The Purpose of The Good News Club

The Good News Club ("GNC") is a nonsectarian Christian youth organization that develops children's moral values by using Bible stories, games, scripture, and songs in a fun setting. The Good News Club is

---

[3] During his deposition, Superintendent Livshin testified as follows:

Q: "And if one of the purposes of the Boy Scouts is to influence a boy's character, development and spiritual growth, would the Boy Scouts still be allowed to use school facilities?"

A: "Yes."

Joint Appendix before the Second Circuit ("JA") at 186, ln. 19-23.

open to any child. Children are required neither to accept a statement of faith nor to swear an oath to God to be a member of the Club. Appendix H5 (¶41-45). GNC adopts a viewpoint that a relationship with God is necessary to implement and to make moral values meaningful. The Milford chapter of GNC has approximately 25 members (ages 6–12) and is led by Steve and Darleen Fournier.

GNC meetings center on a Bible story that teaches children a moral value. A brief prayer of thanksgiving opens a typical GNC meeting. Next a song is sung that references God. The children then play games designed to teach them a Bible verse that focuses on the moral value being taught that week. After the games, the children are told a Bible story that reflects a moral such as "do not be jealous." After the moral is presented, the children are then challenged to live out the value by trusting in God. Children are invited to see Ms. Fournier privately if they would like a time of individual discussion and prayer about establishing a relationship with God.

3. GNC Application to use Milford's Facilities

In the fall of 1996, GNC applied to use school facilities to conduct its meetings. GNC's application stated that club meetings consisted of a fun time of singing songs, hearing a Bible lesson, and learning scripture. That same day, Dr. Robert McGruder, then superintendent of Milford, informed GNC that it would not be permitted to use school facilities because "religious groups could not use the school building."

B. The Courts Below

Petitioners believed that Milford's exclusion of religious groups was illegal. GNC brought a civil

rights action pursuant to 42 U.S.C. § 1983. Relying on the Eighth Circuit decision in *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501 (8th Cir. 1994), which held that a public school cannot discriminate against Good News Clubs if it allows other youth groups like the Boy Scouts to use its facilities, GNC moved for and obtained a preliminary injunction to prevent Milford from enforcing its discriminatory ban against groups that have religious purposes.

Ultimately, the parties cross-moved for summary judgment. The district court vacated the preliminary injunction and granted Milford's motion. GNC appealed.

A divided panel of the Second Circuit affirmed the district court's decision. Judge Minor, writing for the majority, found that Milford had opened its facilities to allow groups to teach moral values and that GNC teaches "secular values such as obedience or resisting jealousy." 202 F.3d at 509.

Nevertheless, the majority held that Milford could discriminate against GNC. Critical to the majority's analysis was that GNC's speech went beyond the presentation of moral values and included the "Christian viewpoint." The court opined that "[t]he Christian viewpoint, as espoused by Reverend Fournier contains an additional layer [of speech]":

> [Because we are teaching morals from a Christian perspective, we would present that perspective, which is that] these morals or these values are senseless without Christ, that's to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the

> strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy.

Id. at 509-10.

This "additional layer" of speech, according to Judge Minor's opinion, transformed the subject matter of GNC's speech from teaching moral values from a Christian perspective to religious instruction. *Id.* at 510. Judge Minor concluded, therefore, that Milford's exclusion of GNC from its facilities was based on constitutionally permissible subject matter discrimination, rather than constitutionally impermissible viewpoint discrimination.

In arriving at its decision, the majority reached the opposite conclusion from the Eighth Circuit in *Good News/Good Sports Club v. Ladue School District*, 28 F.3d 1501 (8th Cir. 1994), "which decided the same question in what seems to be a substantially identical context." 202 F.3d at 511.

Judge Jacobs dissented from the majority's opinion and its rejection of precedent. Judge Jacobs would have adhered to the reasoning of the Eighth Circuit and would have found that Milford, like the school district in the *Good News/Good Sports Club* case, discriminated against GNC because of its Christian viewpoint. 202 F.3d at 512.

More significantly, the dissent concluded that the majority's analysis irreconcilably conflicted with this Court's decision in *Lamb's Chapel v. Center Moriches School Dist.*, 515 U.S. 384 (1993). 202 F.3d at 513.

The crux of Judge Jacobs's disagreement with the majority was that "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." *Id.* at 512. Judge Jacobs opined that "the subject matter (of morals and character) is 'secular' in the sense that it is often informed by secular perspectives; but *the subject matter does not change* when it is informed by viewpoints that are sectarian.... No one should be surprised that the religious viewpoint on morality looks very much like religion itself." Id. at 514. (Emphasis added.)

Thus, Judge Jacobs concluded, as did the Eighth Circuit, that "the club's message is in fact the teaching of morals from a religious perspective" and exclusion of the Club from use of school facilities violated the First Amendment. *Id.* at 515.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for three reasons:

(1) The Second Circuit explicitly rejected the collective wisdom of the Eighth Circuit in *Good News/Good Sports Club v. School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994), and the Tenth Circuit in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), and charted a unique course of First Amendment jurisprudence. This course has now been followed by the Fifth Circuit as well. *Campbell v. St. Tammany's School Board*, 206 F.3d 1273 (5th Cir. 2000). Because of the divergence of these precedents, the First Amendment has a different meaning in New York than in Missouri. Christian youth organizations

in the Second and Fifth Circuits have lost constitutional freedoms that are guaranteed to other similar groups located in the Eighth, Ninth, and Tenth Circuits.

(2) This Court's precedents have been displaced by the Second Circuit. The Second Circuit constructed a legal distinction between viewpoint discrimination and subject matter discrimination that this Court has rejected twice. This Court in *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993), and in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), refused to accept the argument that an invitation to establish a relationship with God transforms speech from a religious viewpoint on a subject matter into the subject matter of religion.

(3) The Second Circuit banished into legal oblivion this Court's admonition that governmental officials' inquiries into the significance of words and practices of religious speech unconstitutionally entangles the state with religion. *See Widmar v. Vincent*. 454 U.S. 263 (1981). The Second Circuit explicitly invited government officials to examine the significance of religious speech and then make essentially theological determinations as to whether that speech constitutes religion, worship, or instruction.

I. The Decision of the Second Circuit Conflicts with Decisions of the Eighth, Tenth, and Ninth Circuit Courts Over the Proper Application of the *Lamb's Chapel* Standard to Religious Speech.

A. A direct conflict exists between the Second and Eighth Circuits regarding whether a school district that allows use of its facilities to youth groups to speak on the moral issues may discriminate against youth groups that seek to discuss the same topic from a religious viewpoint.

The Second Circuit's decision below conflicts with the Eighth Circuit's decision in *Good News/Good Sports Club*, 28 F.3d 1501, which "decided the same question in what seems to be a substantially identical context." *Good News Club*, 202 F.3d at 512.

In *Good News/Good Sports*, the Eighth Circuit dealt with the right of a Good News Club to use school facilities after school hours. The Ladue school district allowed the Boy Scouts use of its facilities, but refused to permit access by the Good News Club/Good Sports Club. 28 F.3d at 1503.[4] Access was denied solely because the group discussed moral development from a religious viewpoint.

A divided panel of the Eighth Circuit held that a school district could not deny use of its facilities to a religious youth group, if it allowed other youth groups such as the Boy Scouts to use them. The court concluded that the Good News/Good Sports club

[4] The Missouri club wanted to use school facilities to foster the moral development of junior high school students ... through prayer, Bible reading, and singing religious songs. 28 F.3d at 1503. This is essentially the same purpose for which the New York Club wanted to use to Milford school. *See Good News Club*, 202 F.3d at 513 (Judge Jacobs comparing the purposes of the two clubs).

wanted to speak on the same subject matter as the Scouts -- "moral character and youth development" and that the club's religious speech was a viewpoint on that subject matter. *Id.* at 1506. The school could not, therefore, consistent with this Court's holding in *Lamb's Chapel*, exclude the club from using school facilities.

Petitioners request that this Court grant their petition for a writ of certiorari to resolve the direct conflict between the Second and Eighth Circuits. Religious youth groups in the Second Circuit have lost constitutional freedoms that are guaranteed to identical groups located in the Eighth Circuit. Such incongruous interpretations of the First Amendment should not go unresolved by this Court.

B. There is a direct conflict between the Second Circuit and the Tenth Circuit as to whether a government forum can exclude moral instruction from a religious viewpoint when its permits others kinds of moral instruction.

The Second Circuit's decision below also conflicts with the Tenth Circuit's decision in *Church on the Rock*, *supra*, which decided that the prohibition of religious, but not secular, instruction violates the First Amendment.[5]

[5] Judge Minor's opinion never discussed *Church on the Rock* despite being raised by petitioners in their brief. Judge Minor, writing for a divided panel of the Second Circuit in *Bronx Household of Faith v. School Dist. No. 10*, 127 F.3d 207, 214 (2nd Cir. 1997), recognized the *Church on the Rock* approach to *Lamb's Chapel* and explicitly declined to follow the Tenth Circuit. *Cf. Bronx Household*, 127 F.3d at 221 (Judge Cabranes in dissent

In *Church on the Rock*, the City of Albuquerque's senior center had a policy that discriminated against religious speech. The policy prohibited religious instruction, but allowed discussion of religious materials as literature, history, or philosophy. 84 F.3d at 1277.

The litigation emanated from a church's request to show a Christian film entitled *Jesus* at the city senior center. *Id.* The City denied the church's request and the church sued. The City argued that the discrimination against the church was permissible subject matter discrimination and not impermissible viewpoint discrimination. The Tenth Circuit rejected the City's argument:

> The film *Jesus* dealt with subject matter similar to that which would be included in a class on the Bible as literature. The film ran afoul of City policy, however, by advocating the adoption of the Christian faith.... Because the prohibited perspective, not the general subject matter triggered the decision to bar private expression, the City's policy is properly analyzed as a viewpoint-based restriction on speech.[6]

---

would have followed the Tenth Circuit's decision.) Apparently, the court felt that this prior decision obviated the need to discuss the case.

[6] Milford's policy, as expressed by Superintendent Livshin closely mirrors the policy in *Church on the Rock*:

Q: "Pursuant to the description of the Good News Club as outlined in Exhibit D [the school use application which described the club's meetings as consisting of a fun time of singing songs, hearing a Bible lesson, and learning scripture], would the Good News Club qualify for use of the school facilities?"

A: "The problem that I have that I would need clarification on, children hear Bible story and learn Scripture, I don't know in what sense. Is the Scripture being presented – how do I want to say this? In a historical approach ... – or is it to be used to promote the gospel. And if that's indeed the case, then I have a problem with it in terms of using the school for that purpose."

JA195 (ln 20-23) – 196 (ln 1-15).

Moreover, even if the City had not previously opened the Senior Centers to presentations on religious subjects, its policy would still amount to viewpoint discrimination. Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. Instruction becomes "sectarian" when it manifests a preference for a set of religious beliefs. Because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.

84 F.3d at 1273. [7] [Citations and internal quotations omitted.]

If Milford Central School were located in New Mexico rather than New York, the First Amendment would prohibit Milford from closing the doors to GNC meetings. First Amendments freedoms should not depend on geographical accidents. Petitioners, therefore, request that the Court grant their petition for a writ of certiorari to resolve the divergent interpretations of the First Amendment between the Courts of Appeals and set a uniform interpretation of the Constitution.

C. The Second and Fifth Circuits conflict with the Ninth Circuit over the proper application of *Lamb's Chapel* to speech that involves prayer.

In *Gentala v. City of Tucson*, ___ F.3d ___ (Nos. 97-17062, 97-1069, 9th Cir., April 20, 2000), the City of Tucson established a "Civic Events Fund." The Fund provided financial support for events relating to the historical, cultural, and ethnic heritage of the City and the nation. The Fund precluded reimbursement for events held in direct support of religious organizations.

Patricia and Robert Gentala applied to the Fund for reimbursement for the costs of city services for an event to celebrate the National Day of Prayer. Their application stated that the event was to organize a

[7] Milford's policy closely mirrors the policy in *Church on the Rock*. Milford's policy opens the school for "any instruction in any branch of education, learning or the arts," except teaching that school officials deem to be religious instruction.

gathering of Tucson Christians and that participants would be led in prayer for a variety of non-sectarian concerns.

The Fund denied the Gentalas' reimbursement request. The Gentalas sued the City, alleging the Fund's refusal to pay for cost of religious events violated the Free Speech Clause of the First Amendment.

A divided panel of the Ninth Circuit held that the Fund created a limited public forum. It further found that while the Gentalas' event had sectarian elements, it also had a civic character, and fit within the general subject matter of events for which the Fund was created. The court, relying on *Lamb's Chapel, supra* and *Rosenberger, supra* concluded that the City could not deny funds to a public prayer service merely because it would have brought a religious perspective to an otherwise permissible conversation.

The dissent, in contrast, would have adhered to the Second Circuit's reasoning in *Good News Club v. Milford Central School*, 202 F.3d 503 (2nd Cir. 2000) and the Fifth Circuit's reasoning in *Campbell v. St. Tammany's School Board*, 206 F.3d 482 (5th Cir. 2000) and as a result would have denied funding for the Gentalas' prayer service.[8]

[8] In *St. Tammany's School, supra*, the school opened its facilities, after school hours, for community use for civic purposes that pertain to the welfare of the community. 206 F.3d at 484. The policy, however, forbade the school from being used for religious services or religious instruction. *Id.* Sally Campbell requested to use the school for a "prayer meeting" at which she planned to discuss family and political issues, pray about those issues, and seek to engage in Biblical instruction with

The Court should grant this petition to resolve the conflict between the Second, Fifth, and Ninth circuits as to whether a group can be excluded from a forum because its speech, although on a permissible topic, adopts a religious perspective which includes prayers to God.[9]

II. The Decision of the Second Circuit Conflicts with this Court's Decision in *Lamb's Chapel v. Center Moriches School Dist.*, 515 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), which Prohibited Viewpoint Discrimination Against Religious Speakers.

---

regard to those issues. The school excluded Ms. Campbell. The Fifth Circuit, adopting the decision in *Bronx Household of Faith*, upheld the exclusion as constitutional.

[9] *Culbertson v. Oakridge School District*, No. 99-35165 (9th Cir. argued March 2000) concerns the rights of a Christian youth group to have public school teachers distribute their informational materials on an equal basis with other after school clubs and to have equal access to school facilities to meet after school like other clubs. The United States District Court for the District of Oregon. *Culbertson v. Oakridge School District*, No. 96-6216-TC (D. Or. 1996) Chief Judge Michael Hogan granted the plaintiffs' motion and ordered that the school distribute plaintiffs' literature to the children and to allow plaintiffs access to school facilities after hours. The district court did not issue a written opinion. On January 5, 1999, the district court issued its order without a written opinion and Oakridge appealed.

The Second Circuit's analysis can not be squared with this Court's decision in *Lamb's Chapel, supra. Lamb's Chapel involved a New York school use policy identical to the policy involved in this case.* The policy allows all community speakers, except those with a religious purpose, to use school facilities.

In *Lamb's Chapel*, a church wanted to use the Center Moriches School auditorium for admittedly religious purposes. *Lamb's Chapel*, 508 U.S. at 389. The church proposed to show a six-part film series by Dr. James Dobson, the head of a national Christian evangelistic organization. *Id.* at 388. The film exhorted parents to fight "society's slide towards humanism" by instilling Christian values in their children and urged viewers to adopt a personal relationship with Jesus Christ to become better parents. *Id.* at 388-89, n.3.

The school denied the church use of its facilities because it had a religious purpose. Judge Minor, writing for the Second Circuit, upheld the school district's decision.

This Court, in reversing Judge Minor and the Second Circuit, noted that the issue was not whether the church's speech in *Lamb's Chapel* was religious, but whether it was speaking on child rearing from a religious standpoint. *Id.* at 393. Similarly in this case, Milford concedes that it has no objections to speakers promoting the moral and spiritual development of children. Milford objects only when the speaker adopts the viewpoint that a relationship with God is necessary to make the values meaningful. In other words, the subject matter is fine, but the religious viewpoint is not. As Judge Jacobs noted in his dissent below, the majority's analysis is difficult to square with this Court's decision in *Lamb's Chapel.*

Plaintiffs request the Court to grant their petitions to affirm the continued validity of this Court's analysis in *Lamb's Chapel.*

This Court dealt with substantially the same issues raised in this case in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).[10] In *Rosenberger*, a student organization requested, but was denied, indirect funding for a Christian periodical called *Wide Awake*. 515 U.S. at 825-27. The purpose of *Wide Awake* was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. Each issue of *Wide Awake* invited the students to accept Jesus Christ as their savior. *Wide Awake*'s essays on secular topics also invited students to establish a relationship with Christ.

Justice Souter, *in dissent*, concerned about the state funding of religion, concluded:

> *[Wide Awake]* is not merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to *enter into a relationship with God as revealed in Jesus Christ*, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ. These are not the words of

[10] The Second Circuit's majority opinion never discussed *Rosenberger*, although petitioners relied upon it extensively in their main brief (p. 29-33) and in their reply brief (p. 2, 19).

> "student news, information, opinion, entertainment, or academic communicatio[n]," but the words of "challenge [to] Christians to live, in word and deed, according to the faith they proclaim and to consider what a personal relationship with Jesus Christ means." ... *It is nothing other than the preaching of the word* which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Id. at 867-68 (internal citations omitted, emphasis added).

The dissenters in *Rosenberger* believed that *Wide Awake's* speech, by inviting students to accept Christ as their Savior, left the permissible realm of discussing secular subjects from a Christian perspective and entered the forbidden world of religious teaching. Thus, state funding of *Wide Awake* violated the Established Clause in the opinion of the dissenters.

The majority of the Supreme Court rejected the notion that *Wide Awake*'s speech, *(e.g.*, telling students that in order to overcome eating disorders or racism they needed a personal relationship with God), amounted to religious instruction. Rather, the Supreme Court held that *Wide Awake* presented a Christian perspective on how to overcome racism and eating disorders. Justice Kennedy opined that "[r]eligion may be a vast inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831.

The Second Circuit has embraced the dissent's

logic, although this case involves access to facilities rather than funding of religious activities. Judge Minor found that by telling club members that they needed a personal relationship with God to carry out the various moral lessons, GNC's speech crossed the divide between discussing morals from a Christian perspective and religious teaching. *Good News Club*, 202 F.3d at 509-10.

Petitioners request that this Court grant certiorari to rectify the Second Circuit's failure to follow this Court's precedent in *Rosenberger*.

III. The Decision of the Second Circuit Conflicts with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) by Requiring Government Officials to Scrutinize and Classify Religious Speech and Thereby Entangling Government with Religion in an Unconstitutional Manner.

The Second Circuit called into question this Court's ruling in *Widmar v. Vincent*. 454 U.S. 263 (1981). In *Widmar*, this Court warned that inquiries into the significance of religious words and practices tend inevitably to entangle the state with religion in a manner forbidden by the constitution. *Widmar* 454 U.S. at 269-70. *Accord Rosenberger*, 515 U.S. at 844 (scrutinizing the content of speech lest it contain too great a religious content is inconsistent with the Establishment Clause). The Second Circuit ignored this warning and explicitly commended government officials for scrutinizing the significance of religious speech and then making essentially theological classifications as to whether that speech constitutes religion, worship, or instruction. *Good News Club*, 202 F.3d at 510. *But See Bronx Household of Faith v. School Dist. No. 10*, 127 F.3d 207, 219-21 (2nd Cir. 1997) (Cabranes, J., dissenting) (where a church

desired to use school facilities for a Sunday worship service that contained religious instruction, the very act of classifying speech as religious instruction or worship "may deeply - and unconstitutionally - entangle public officials in theological determinations.")

Moreover, the Second Circuit failed to offer any framework or objective guidelines whatsoever to let government officials know when presenting morals from a religious viewpoint morphs into religious instruction. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (approving of placing unbridled discretion in the hands of government officials to determine speech rights). The absence of legal definitions and standards threatens to both embroil governments in litigation, and also to turn government officials into theological arbiters – a role best left to the church rather than the state. Petitioners ask this Court to grant their writ of certiorari.

IV. Summary Reversal Is Appropriate

The decision rendered by the Second Circuit so far departs from the teaching of this Court's three most relevant decisions (*Lamb's Chapel*, *Rosenberger*, and *Widmar*) that correction of the error is warranted. Indeed, the Second Circuit's rejection of this Court's precedent merits summary reversal.

CONCLUSION

Milford Central School has decided to open a forum, a market place, for community groups to promote the moral and spiritual development of children. GNC is forbidden from entering that marketplace and offering the children of Milford the opportunity to chose to hear about morality from a

religious perspective. The Second Circuit sanctioned Milford's discrimination. This is contrary to the conclusions that other Courts of Appeals have reached, contrary to the decisions of this Court, and contrary to our nation's most fundamental belief that the blessings of freedom and liberty are secured by a marketplace of ideas free from viewpoint discrimination.

This petition is worthy of the Court's attention. There are no prudential concerns that counsel against the granting of this petition. The facts are undisputed, Milford's policy is still in effect, and the Second Circuit clearly and explicitly rejected the collective wisdom of the Ninth, Eighth, and Tenth Courts of Appeals on the proper interpretation of this Court's decision in *Lamb's Chapel* and *Rosenberger*.

For the above stated reasons, plaintiffs respectfully request this Court to grant the petition for a writ of certiorari.

Submitted this 16th day of June 2000,

Thomas Marcelle
Counsel of Record
71 Devonshire Drive
Slingerlands, New York 12159
Telephone: (518) 475-0806

John W. Whitehead
Steven H. Aden
The Rutherford Institute
P.O. Box 7482
Charlottesville, Va. 22906-7482
Telephone: (804) 978-3888

THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLEEN FOURNIER, Plaintiffs-Appellants,

- v.-

MILFORD CENTRAL SCHOOL,

Defendant-Appellee.

Docket No. 98-9494

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

202 F.3d 502

June 23, 1999, Argued
February 3, 2000, Decided

COUNSEL: THOMAS J. MARCELLE, Slingerlands, NY, for Plaintiffs-Appellants.

FRANK W. MILLER, Ferrera, Fiorenza, Larrison, Barrett & Reitz, East Syracuse, NY for Defendant-Appellee.

Jay Worona, New York State School Boards Association, Inc., Albany, NY for the New York State School Boards Association, Inc., as amicus curiae.

JUDGES: Before: JACOBS, MINER and PARKER, Circuit Judges. Judge Jacobs dissents in a separate opinion.

MINER, Circuit Judge:

Plaintiffs-appellants The Good News Club (the "Club"), Darleen Fournier, and her seven-year-old daughter Andrea, n1 appeal from a summary judgment entered in the United States District Court for the Northern District

of New York (McAvoy, C.J.) in favor of defendant-appellee Milford Central School ("Milford" or "the school"). The action was brought to secure access to school premises for the purpose of conducting Club meetings, and the complaint contains demands for monetary as well as injunctive relief. The Club's claims are bottomed, *inter alia*, on the right to free speech under the First and Fourteenth Amendments. The district court found that the Club's activities were properly characterized as religious instruction and prayer and not the teaching of values or morals from a religious viewpoint. Accordingly, the court concluded that the school could properly exclude the Club because it had not opened its facilities for religious instruction or prayer.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

n1 For convenience, except where necessary for clarity, plaintiffs are collectively designated as "the Club" throughout this opinion.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

For the reasons that follow, we affirm.

BACKGROUND

In August of 1992, the Milford Central School District adopted a policy (the "Community Use Policy" or the "Policy") pursuant to § 414 of the New York State Education Law that governs the conditions under which outside organizations may utilize school facilities. The Community Use Policy provides that district residents may use school facilities for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall

be open to the general public," and otherwise consistent with state law. The Policy expressly forecloses use for religious purposes and requires that applicants certify that their proposed use complies with the Policy:

> School premises shall not be used by any individual or organization for religious purposes. Those individuals and/or organizations wishing to use school facilities and/or grounds under this policy shall indicate on a Certificate Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

Under the Community Use Policy, the school has allowed a number of organizations to use its facilities, including the Boy Scouts, the Girl Scouts, and the 4-H Club.

The Good News Club is a community-based Christian youth organization open to children between the ages of six and twelve. The Club takes its name from the "good news" of Christ's gospel and the "good news" that salvation is available through belief in Christ. The purported purpose of the Club is to instruct children in moral values from a Christian perspective. It is affiliated with an organization known as Child Evangelism Fellowship ("CEF"), a Christian missionary organization that oversees and provides support to chapters of The Good News Club throughout the country. Among other things, the CEF provides teaching materials, prayer booklets for distribution called the "Daily Bread" and training to Club leaders.

A typical Club meeting begins when the participating children, who range from kindergarten-age to sixth graders, arrive at the meeting site. If a child remembers

the "memory verse" from the previous week's meeting, she may recite it and is rewarded with a prize. The meeting officially opens with a prayer led by Reverend Stephen Douglas Fournier n2 that gives thanks and entreats God for His blessing on the meeting. The group then sings the Good News Club theme song, the lyrics of which refer to Jesus Christ and are generally "about . . . good news."

----------Footnotes----------

n2 Reverend Fournier is the husband of plaintiff-appellant Darleen Fournier, the father of plaintiff-appellant Andrea Fournier, and the pastor of Milford Center Community Bible Church. He is not a party to this action but describes himself as a "teacher" for the Club.

----------End Footnotes----------

The next segment of a Club meeting involves a "moral or value" lesson centered around a verse from either the Old or the New Testament and its teaching. To learn the "memory verse" for the lesson, the Club members play games that focus on repetition of the verse. Next, the children are told a Bible story that emphasizes the same moral value that is represented in the day's memory verse. The story concludes with a "challenge and invitation" segment, which challenges the children to live by the value taught in the day's lesson through trust in God and Jesus Christ. Depending on the elapsed time, when the story is concluded, the group leader may ask the children questions about the story or play a game that emphasizes the teaching in the story. The group may also sing a song that relates to the story.

The record includes a number of specific lesson plans provided by CEF for conducting Club meetings. n3 One

such lesson, taught by Darleen Fournier according to the lesson plan, is entitled "Israel Demands a King" from the series "David: A Man after God's Heart." The teaching of the lesson is centered around a verse from Ephesians 5:17, "wherefore be ye not unwise, but understanding what the will of the Lord is." According to the materials, the "teaching objective" is that "the saved child will desire God's best, allowing God to have first place in his life" and the "main teaching" is to "give God first place in your life."

----------Footnotes----------

n3 The materials from CEF contain, in their introduction, a list entitled "How to Lead a Child to Christ," which includes the following directives:

. Show him his NEED of salvation; that all persons are not going to Heaven; that no one in himself is good enough to go and the result of sin is forever separation from God (Romans 3:23; Revelation 21:27; John 8:21, 24).

. Show him the WAY of salvation. Salvation is a free gift because the Lord Jesus took our place on the cross, was buried and rose again from the dead (John 3:16; Ephesians 2:8; 1 Corinthians 15:3-4).

. Lead him to RECEIVE the gift of salvation, even Jesus Christ, by trusting Him as his personal Savior (John 1:12; Revelation 3:20).

. From the Word of God, help him find ASSURANCE of his salvation (John 3:36; Revelation 3:20; Hebrews 13:5).

. Lead him to CONFESS Christ (Matthew 10:32). This confession should be made to you, other

workers, later to his friends and as circumstances permit, in a public church service.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

The lesson plan distinguishes in the application of the memory verse between those children who are "saved" and those who are "unsaved." The lesson applies to the saved in that "if you have believed on the Lord Jesus as your Savior, one of the wisest decisions you can make is to give God first place in your life. Do and say those things that will please Him." As for the unsaved, "if you have never believed on Jesus to save you from sin, you can be sure this is the wisest and most important decision you will ever make. You will be given an opportunity later in class today to believe on Jesus." n4

- - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

n4 The emphasis for "unsaved" children is the same in each lesson plan: to accept Jesus Christ as their savior.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

The story in "Israel Demands a King" centers around events recounted in I Samuel 8-10, wherein the elders of Israel requested that Samuel appoint a king over them, contrary to God's will. Notwithstanding Samuel's warning of dire consequences, the people insisted that a king be appointed, and Samuel was directed by God to anoint Saul as the new king. Though Saul accepted the role as king, Samuel "felt sad for his people who had rejected God as their King. He knew this was not the best way. It could only lead to sorrow and trouble for them."

"Israel Demands a King" includes the following "Challenge and Invitation" segment:

CHALLENGE

If you have believed on the Lord Jesus, trusting Him to save you, will you remember this week that God's best for you is to give Him first place in your life? When you are tempted to allow other things to take over that special place, will you stop and think about all God has done for you? Remember what our memory verse says. (Say Ephesians 5:17 together.) Don't be foolish like the people of Israel, but understand that God's will for you is that you be a person after His own heart, giving Him first place in your life. If you have been allowing other things to have first place, confess that sin to God. Ask Him to help you keep Him first.

I have a slip of paper with a number one printed on it that says, "Keep God first this week!" You could put this paper on your mirror, by your bed or on your locker door at school. Let it be a reminder to you all week long to give God first place in your life.

INVITATION

God cannot be first in your life until you believe on Him as your Savior from sin. If you are willing to admit to God that you have sinned, and you believe that the Lord Jesus suffered and died to take the punishment for your sin and came alive again, you can be saved today. The Bible says, "Believe on the Lord Jesus Christ, and thou shalt be saved" (Acts 16:31). Will you believe on Him, trusting Him to save you? You can talk to the Lord right now. Say something like this: "Dear Lord Jesus, I do believe You died for me. I'm sorry for the wrong things I've done. Please take away my sin and help me obey You. Thank You for saving me today." (Ask those who prayed this prayer to meet you in a designated

> place after class so you can answer any questions they may have. Remind the children that if they did not pray now, they can talk to the Lord even after they leave.)

After the story, if time permits, the group leader shares a "missionary story" with the children, which is described by Reverend Fournier as a "fictitious story that deals with some part of the world where missionary activity is going on." n5 After the missionary segment, the group leader may play another game with the children and may award prizes based on recitation of the memory verse and on their performance in the games. If time allows, the group may sing another song. At various times throughout the meeting, the group may pray for "CEF missionaries" and to "receive Jesus as [a child's] personal Savior." The meetings adjourn after approximately one hour. In the course of the meeting, children are invited to meet with Darleen Fournier privately after the meeting for individual discussion and prayer. During the 1995-96 school year and into the fall of 1996, the Good News Club held its meetings at the Milford Center Community Church. During that time, the school provided bus transportation for some of the children and parents provided transportation for other children. In September of 1996, however, the school ceased providing bus service from the school to the church, which meant that some children were unable to attend Club meetings.

----------Footnotes----------

n5 The missionary stories "have to do with spreading the gospel." Reverend Fournier described one such story as follows:

> The missionary story for this quarter was of two young Haitian boys, one boy . . . goes to a Bible

> study and he invites the other boy to that Bible study, and that boy ends up going and the conflict that it causes with his father . . . in the end the father ends up going as well.

----------End Footnotes----------

Consequently, in September of 1996, Darleen Fournier, on behalf of the Good News Club, submitted a standard District Use of Facilities Request Form (the "Form") to Dr. Robert C. McGruder, Interim Superintendent of Schools in the Milford School District. The Form stated that the proposed use of the school's facilities was to have "a fun time of singing songs, hearing [a] Bible lesson and memorizing scripture." A few days after the request, Superintendent McGruder received a second request on behalf of the Good News Club from Reverend Fournier. On October 3, 1996, McGruder denied the requests in a letter, articulating that he understood the Good News Club's proposed use of the facilities to be "the equivalent of religious worship . . . rather than the expression of religious views or values on a secular subject matter."

On January 7, 1997, counsel for the Good News Club wrote to McGruder, asserting that McGruder's denial of access was in violation of the Club's "right to free speech, its right to equal protection of the law, and its rights under the Restoration of Religious Freedom Act," and noting that the school had previously allowed "other groups such as the Girl Scouts to use school facilities." The Club's attorney promised to bring suit if the school did not reverse its position and allow the Good News Club to use school facilities. Three days later, Milford's counsel requested materials to further clarify the nature of the instruction and activities that would take place at a Club meeting. The Club's counsel responded in a letter dated January 17, 1997, which contained the following

description:

> The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next[,] Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

The following week, the Good News Club's counsel forwarded a set of materials used or distributed by the Club. Among the materials submitted were a Good News Club invitation printed on an index card, a parental permission slip, a sample puzzle, and a copy of the "Daily Bread." This issue of the Daily Bread contained stories that refer to the second coming of Christ, accepting the Lord Jesus as the Savior, and believing in the Resurrection and in the descent of the Lord Jesus from Heaven.

After a review of the materials, Superintendent McGruder and counsel determined that "the kinds of activities proposed to be engaged in by the Good News Club are not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." On February 26, 1997, the Milford Board of Education adopted a resolution denying the Good News Club's request to use its facilities during the pendency of Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207 (2d Cir. 1997). The substance of this resolution was transmitted to the Good News Club by letters dated February 28, 1997 and March 3, 1997. The

Good News Club filed a complaint in the United States District Court for the Northern District of New York on March 7, 1997, alleging claims under 42 U.S.C. § 1983 for deprivation of its rights to free speech under the First and Fourteenth Amendments, its right to equal protection under the Fourteenth Amendment, and its right to religious freedom secured by the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb et seq. The Good News Club sought injunctive relief, damages and attorneys' fees.

On April 14, 1997, the district court preliminarily enjoined the school from enforcing its ban on the Club's use of school facilities. The court reasoned that there were sufficiently serious questions regarding the parties' understanding of the content of the Club's meetings to justify the injunction. On August 3, 1998, the parties cross-moved for summary judgment and, on September 25, 1998, stipulated to the facts of the case. In a Memorandum-Decision and Order dated October 23, 1998, the district court addressed the parties' cross-motions. The court began its analysis by noting that the First Amendment does not guarantee unbridled access to public property but that access to such property depends on the character of the property at issue and the nature of the proposed use. Given the dictates of New York Education Law § 414 and our previous decisions on the subject, the court concluded that the Milford school was a limited public forum. The court next considered whether the restrictions in the limited public forum passed constitutional muster, i.e., whether they were reasonable and viewpoint neutral. After an extensive review of the purposes of and activities associated with the Good News Club, the court concluded that the Club's activities constituted religious instruction and prayer. The court determined that the school had not previously allowed a group to use its facilities for religious instruction or prayer and that the

Club's attempted comparisons to the Boy Scouts, the Girl Scouts, and the 4-H Club were unpersuasive. In this regard, the court noted that, although the Boy Scouts "teach reverence and a duty to God," this was "only a part of its overall purpose[,] which is ... personal growth and development of leadership skills." Because the court found that the Club is a religious youth organization that proposed religious instruction and prayer and not an organization seeking to teach morals from a religious perspective, it dismissed the Club's free speech claim. The court thereafter dismissed the Club's equal protection claim under the authority of Bronx Household of Faith, 127 F.3d at 217 and entered judgment on October 23, 1998. n6 This appeal followed.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n6 The court dismissed the Club's RFRA claim as moot in light of City of Boerne v. Flores, 521 U.S. 507, 536, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997).

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

DISCUSSION

We review the district court's grant of summary judgment de novo. See Johnson v. Wing, 178 F.3d 611, 614 (2d Cir. 1999).

On appeal, the Good News Club presses as its sole contention that the First Amendment dictates that the Club cannot constitutionally be excluded from use of the Milford Central School facilities. n7 It argues that it seeks to use the facilities to teach morals and values, just as other organizations have done in school facilities. Thus, it asserts, to exclude the Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n7 The Club has abandoned its equal protection and RFRA claims on appeal.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

The nature of permissible limitations on speech is based on "the nature of the forum in which the speech is delivered." Bronx Household of Faith, 127 F.3d at 211. There are three general types of forums in this regard: (1) traditional public forums, (2) designated or limited public forums, and (3) non-public forums. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Limited public forums are those that the government has designated as a "place . . . of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." Bronx Household of Faith, 127 F.3d at 211 (quotation omitted). We have previously held on a number of occasions that N.Y. Education Law § 414 and policies promulgated thereunder create limited public forums. See, e.g., Full Gospel Tabernacle v. Community Sch. Dist. 27, 164 F.3d 829, 829 (2d Cir. 1999) (per curiam), aff'g 979 F. Supp. 214, 220 (S.D.N.Y. 1997); Bronx Household of Faith, 127 F.3d at 215; Deeper Life Christian Fellowship, Inc. v. Board of Educ., ("Deeper Life I") 852 F.2d 676, 680 (2d Cir. 1988). Milford's Community Use Policy specifies who may use school facilities, when, and for what purposes. The parties agree, as they did in the court below, that the Milford school has created a limited public forum. In light of our precedent, the district court's conclusion, and the parties' agreement, we think it clear that the Community Use Policy has created a limited public forum in the Milford school facilities.

Restrictions on speech in a limited public forum will withstand First Amendment challenge if they are reasonable and viewpoint neutral. n8 See Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829-30, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995); Bronx Household of Faith, 127 F.3d at 214. On appeal, the Good News Club challenges the application of both of these criteria. Taking first the reasonableness criterion, the Club argues that the restriction is unreasonable because Milford's articulated purpose for the restriction -- "ensuring that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof" -- is unpersuasive. It argues that there is little risk that children would confuse the Club's use of school facilities with the school's endorsement of the religious teachings.

----------Footnotes----------

n8 Milford argues that our inquiry should end with the observations that (1) the denial of permission to use school facilities was pursuant to the Community Use Policy and N.Y. Education Law § 414, and (2) § 414 has always been upheld as constitutional. In this regard, Milford presumes what it needs to prove: by their terms, § 414 and the Community Use Policy do not allow use of school facilities for religious purposes. See, e.g., Deeper Life Christian Fellowship, Inc. v. Sobol, ("Deeper Life II") 948 F.2d 79, 84 (2d Cir. 1991). If the Club's use is not a "religious use" but merely the teaching of morals from a religious viewpoint, however, Milford's exclusion of the Club would not comply with § 414 and its Community Use Policy and would be unconstitutional viewpoint discrimination.

----------End Footnotes----------

This argument is foreclosed by precedent. In Bronx Household of Faith, we stated that "it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises." 127 F.3d at 214. Furthermore, "it is reasonable for state legislators and school authorities to avoid the identification of a . . . school with a particular church." Id. Although we made this pronouncement in the context of an organization requesting to conduct church services in a school, we believe it is equally applicable to the case now before us. The Club argues that it is not a "particular church," but rather a nondenominational Christian organization. This difference, however, is immaterial. The activities of the Club clearly and intentionally communicate Christian beliefs by teaching and by prayer, and we think it eminently reasonable that the Milford school would not want to communicate to students of other faiths that they were less welcome than students who adhere to the Club's teachings. This is especially so in view of the fact that those who attend the school are young and impressionable.

The crux of the Good News Club's argument is that the Milford school's application of the Community Use Policy to exclude the Club from its facilities is not viewpoint neutral. In this regard, the Club posits that it is teaching moral values, just as the Boy Scouts, Girl Scouts, and the 4-H Club do. The Club contends that, unlike those organizations, it has been excluded because it seeks to teach these moral values from a Christian viewpoint. Though such teachings may involve secular values such as obedience or resisting jealousy, the Christian viewpoint, as espoused by Reverend Fournier, contains an additional layer:

> These morals or these values are senseless without Christ, that's to the children who know

> Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy. n9

- - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

N9 Reverend Fournier also stated in deposition testimony that the values require a relationship with Christ for them to be meaningful to God.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

We conclude, as did the district court, that the Good News Club is doing something other than simply teaching moral values. As we stated in Bronx Household of Faith, it "is not difficult for school authorities to make" the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer. 127 F.3d at 215. Although other cases may present difficult questions of line-drawing, we believe that the school authorities, after thorough inquiry and deliberation, correctly determined that the activities of the Club fall clearly on the side of religious instruction and prayer.

The activities of the Good News Club do not involve merely a religious perspective on the secular subject of morality. The Club meetings offer children the opportunity to pray with adults, to recite biblical verse, and to declare themselves "saved." The Club argues that these practices are necessary because its viewpoint is that a relationship with God is necessary to make moral values meaningful. Even accepting that this precept is

a viewpoint on morality and not a religious principle, it is clear from the conduct of the meetings that the Good News Club goes far beyond merely stating its viewpoint. The Club is focused on teaching children how to cultivate their relationship with God through Jesus Christ. Under even the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious. See Davis v. Beason, 133 U.S. 333, 342, 33 L. Ed. 637, 10 S. Ct. 299 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.")

Particularly illuminating in this regard is a comparison to the plaintiffs' activities in Full Gospel Tabernacle, 164 F.3d at 829, aff'g 979 F. Supp. 214. Plaintiffs in Full Gospel Tabernacle were denied access to a school auditorium in which they wished to conduct "religious worship" services. See 979 F. Supp. at 217. The district court described the services in that case as follows:

> "We would come in and have what's called a group prayer, congregational prayer. Then we would go into praise and worship, sing different praise and worship songs accompanied by music. From there, [the Reverend] would get up and deliver the message, the service for that evening." Following [the Reverend's] sermon, the Reverends . . . engage in an "altar call," where they would "invite someone to receive the Lord as their Savior." The service would then conclude with a closing prayer.

Id. (internal citations to record omitted). It is difficult to see how the Club's activities differ materially from the "religious worship" described in Full Gospel Tabernacle: each has prayers and devotional songs; each has a central sermon or story with a message; each has a

portion in which attendees are called upon to be "saved." Applying a different label to the same activities does not change their nature or import.

In a limited public forum, "constitutional protection is afforded only to expressive activity of a genre similar to those that government has admitted to the limited forum." Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991). Stated differently, for those who seek to speak on a topic or in a manner not contemplated by the public entity in opening the limited public forum "there is no fundamental right of freedom of speech." Bronx Household of Faith, 127 F.3d at 217. The Club attempts to liken its activities to "moral instruction" provided by groups such as the Boy Scouts, the Girl Scouts, and the 4-H Club. Thus, it argues, because the Milford school has permitted these organizations to use its facilities, the school may not exclude the Good News Club. We do not find this argument persuasive. While the Boy Scouts teach reverence and a duty to God generally, n10 this teaching is incidental to the main purpose of the organization, which is personal growth and development of leadership skills. Moreover, there is nothing in the record to indicate that the Boy Scouts require any particular means of demonstrating reverence and duty to God. Similarly, the Girl Scouts vow to "try . . . to serve God and [their] country." Even further afield is the attempted comparison to the 4-H Club, which seeks "to enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults." Each of these organizations focuses on the development of youth in various ways; however, the record includes nothing to indicate that any of these clubs' activities remotely approach the type of religious instruction and prayer provided by the Club. Accordingly, the Milford school's decision to exclude the Good News Club from its facilities was based on content, not viewpoint. See, e.g.,

Rosenberger, 515 U.S. at 829-30; Bronx Household of Faith, 127 F.3d at 214-15 (distinguishing between permissible content-based distinctions and impermissible viewpoint-based distinctions in a limited public forum).

----------Footnotes----------

n10 The Scout Law requires that "[a] Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."

----------End Footnotes----------

The Good News Club leans heavily on the Eighth Circuit's holding in Good News/Good Sports Club v. School Dist., 28 F.3d 1501 (8th Cir. 1994). In Good News/Good Sports, the Eighth Circuit, over a dissent by Senior Circuit Judge Bright, ruled that the school district's exclusion of a Good News Club/Good Sports Club from its facilities constituted impermissible viewpoint discrimination. See id. at 1507. The policy at issue in Good News/Good Sports allowed use of school facilities outside of school hours only for "athletic activities" and Scout group meetings. See id. at 1503. The Eighth Circuit found that the policy's inclusion of the Scouts opened the forum to the subject of "moral and character development," the very same purpose for which the Good News/Good Sports Club sought access. Id. at 1506. Because it found that the only relevant difference between the Scouts and the Good News/Good Sports Club was viewpoint, the Eighth Circuit ruled that the Good News/Good Sports Club could not constitutionally be excluded from school facilities. See id. at 1507.

The Eighth Circuit apparently took for granted that the Good News/Good Sports Club's activities amounted only

to speaking on moral and character development. The opinion contains only a brief recitation of the types of activities that take place at a club meeting, but no examination of their import. See id. at 1502 ("The Club is a community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values. . . . Club activities include skits, singing (including Christian songs), role playing, Bible reading, prayer, and speeches by community role models.")

Based on the record before us and this Circuit's precedent, we are constrained to find that the Club's activities fall outside the bounds of pure "moral and character development."

CONCLUSION

We have examined the Club's other contentions and find them to be without merit. For the foregoing reasons, the judgment of the district court is affirmed.

JACOBS, Circuit Judge, dissenting:

The area of my agreement with the majority is substantial. Thus I agree that the school district has created a limited public forum. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567 (1985). And I recognize that restrictions on speech in a limited public forum withstand First Amendment scrutiny if they are reasonable and viewpoint-neutral. See Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 829-30, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995); Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 211-12 (2d Cir. 1997). "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn . . .

are viewpoint neutral." Cornelius, 473 U.S. at 806, 105 S. Ct. at 3451; accord Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352 (1993). In a limited public forum, content discrimination "may be permissible if it preserves the purposes of that limited forum"; but viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations." Rosenberger, 515 U.S. at 830, 115 S. Ct. at 2517. "The principle . . . 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" Lamb's Chapel, 508 U.S. at 394, 113 S. Ct. at 2147-48 (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 804, 104 S. Ct. 2118, 2128, 80 L. Ed. 2d 772 (1984)).

It is in the application of this standard to the facts of this case that I respectfully dissent.

* * *

In deciding this case, we are called upon to compare the subject matter of the speech offered by certain groups that are allowed to hold meetings at the Milford Central School with the subject matter of the speech proposed by the Good News Club. The majority posits (and I agree) that some groups allowed at Milford Central School present guidance on a range of common moral subjects, such as honesty and self-control. The majority then rules (and I agree) that the board is obliged to accept "an organization seeking to teach morals from a religious perspective." See Majority Opinion at [], [] [hereinafter "Maj. Op."].

The majority rules against Good News nevertheless on the basis of two complementary distinctions. First, although the school district would be obliged to accept

"an organization seeking to teach morals from a religious perspective," the school district is not obliged to accept a "religious youth organization that proposed religious instruction and prayer." See Maj. Op. at []. Second, the majority emphasizes that the Club discusses "religious material through religious instruction and prayer" rather than "secular subjects from a religious viewpoint." See Maj. Op. at [] (citing Bronx Household of Faith, 127 F.3d at 215).

On the basis of these two distinctions, the majority concludes that the Club's rejection was based solely upon the subject matter of its meetings and not upon its religious viewpoint. In my view, when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters.

Generally, I adhere to the opinion of the Eighth Circuit in Good News/Good Sports Club v. School Dist., 28 F.3d 1501 (8th Cir. 1994), which decided the same question in what seems to be a substantially identical context. In the Eighth Circuit case, the Good News/Good Sports Club (for convenience, the "Missouri Club") challenged a policy adopted by a school district in Missouri. The policy allowed various scouting organizations, as well as the school's sports teams, to use junior high school facilities after school, but denied access to other organizations. See id. at 1502-03 (providing access for Girl Scouts, Boy Scouts, Cub Scouts, Tiger Cub Scouts, and Brownies). The Missouri Club, along with its members and their parents, sought injunctive and declaratory relief under 42 U.S.C. § 1983 on the ground that the policy violated their First Amendment right to free speech. See Good News/Good Sports Club v. School Dist., 859 F. Supp. 1239, 1241 (E.D. Mo. 1993). The district court entered judgment in favor of the school district, but the Eighth Circuit reversed on the ground

that the Missouri Club and the scouting groups both offered messages on the topic of moral development, and that it was impermissible viewpoint discrimination to afford access to the Scouts while denying access to the Missouri Club solely because the latter's approach to moral development was religiously grounded. See Good News/Good Sports Club, 28 F.3d at 1505-07.

The Missouri Club and the Club in this case have nearly the same name and are nearly identical in their stated purposes and activities. Compare Good News/Good Sports Club, 28 F.3d at 1502 ("The Club is a community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values. . . . Club activities include skits, singing (including Christian songs), role playing, Bible reading, prayer, and speeches by community role models. The Club is religious, but non-denominational."), with Good News Club v. Milford Central Sch., 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998) ("Although the Club is nondenominational, its stated purpose is to instruct children in family values and morals from a Christian perspective. . . . [A] typical meeting includes an opening prayer, singing of Christian songs, memorization, recital, and discussion of Biblical verses and scripture, and a closing prayer.").

The majority criticizes the Eighth Circuit opinion on the ground that it "apparently took for granted that the Good News/Good Sports Club's activities amounted only to speaking on moral and character development," and thereby adopted the unexamined assumption that the discrimination in question was viewpoint-based. Maj. Op. at []. As I read the Eighth Circuit opinion, however, the court carefully sifted the facts--facts substantially identical to those in the present case--in concluding that the rejection of the Missouri club was based on

viewpoint, not content. See Good News/Good Sports Club, 28 F.3d at 1505-07 & nn.7-9.

I cannot square the majority's analysis in this case with Lamb's Chapel v. Center Moriches Union Free School District. In Lamb's Chapel, the Supreme Court held that a school district violated the Free Speech Clause of the First Amendment when it refused to allow its auditorium to be used by a church for the showing of a film series that presented family issues from a Christian perspective. See Lamb's Chapel, 508 U.S. at 390-95, 113 S. Ct. at 2146-48. The school district's action denied church members the right to speak from their own perspective (Christian) on a topic (family issues) that would otherwise have been accommodated in the forum. See id. at 394, 113 S. Ct. at 2147 ("The film series involved here no doubt dealt with a subject otherwise permissible . . . and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.").

The majority asserts that the present case is controlled by our opinion in Full Gospel Tabernacle v. Community Sch. Dist. 27, 164 F.3d 829 (2d Cir. 1999) ("We affirm for substantially the reasons stated by Judge Haight in the decision below."), aff'g 979 F. Supp. 214 (S.D.N.Y. 1997), in which case a church sought to use school facilities for its church-wide "worship services." 979 F. Supp. at 216. But this case seems to me to be much closer to Lamb's Chapel than to Full Gospel Tabernacle. The majority here would distinguish the message of the Club from the message of the church in Lamb's Chapel--and from the message of the scout groups in this case--on the ground that the message of the Good News Club has an "additional layer" beyond simply teaching "secular values such as obedience or resisting jealousy." Maj. Op. at []. This "additional layer" is the Club's insistence that "these morals or these values are

senseless without Christ." Id. This distinction lacks traction, because Christ is also the central and animating spirit in the viewpoint expressed in the Lamb's Chapel films. Thus in one film, a spokesman on family life warns that the modern family is sliding away from spirituality and toward humanism, and that this slide "can only be counterbalanced by a loving home where Christian values are instilled from an early age." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 384 (2d Cir. 1992). I see no basis for saying that the message of the Good News Club has religious content and that the message of the movie is no more than a religious viewpoint on a secular subject.

The distinction between content discrimination and viewpoint discrimination is elusive and subtle. "Viewpoint discrimination is . . . an egregious form of content discrimination." Rosenberger, 515 U.S. at 829, 115 S. Ct. at 2516. "Discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one." Id. at 830-31, 115 S. Ct. at 2517 (internal citation omitted). The distinction is especially slippery where the viewpoint in question is religious, in part because the sectarian religious perspective will tend to look to the deity for answers to moral questions. The idea that moral values take their shape and force from God seems to me to be a viewpoint for the consideration of moral questions. True, religious answers to questions about morals and character tend to be couched in overtly religious terms and to implicate religious devotions, but that is because the sectarian viewpoint is an expression of religious insight, confidence or faith--not because the religious viewpoint is a change of subject:

> It is, in a sense, something of an understatement to

> speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. . . . Religion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.

Id. at 831, 115 S. Ct. at 2517 (emphasis added).

Although the religious viewpoint thus has the tendency to overwhelm the secularity of a subject matter, this transformative, goal-directed tendency of religious viewpoints does not justify a preference for other viewpoints.

Here, the subject matter is morals and character. The majority focuses on the evident fact that the Club's moral vision entails religious activity, and concludes that this makes the subject matter religious: "Each of these organizations [i.e., those granted access] focuses on the development of youth in various ways; however, the record includes nothing to indicate that any of these clubs' activities remotely approach the type of religious instruction and prayer provided by the Club." Maj. Op. at []. Perhaps not. But that observation begs the question: Does the "religious instruction and prayer provided by the Club" reflect and express this Club's viewpoint on morals and character? The subject matter (morals and character) is "secular" in the sense that it is often informed by secular perspectives; but the subject matter does not change when it is informed by viewpoints that are sectarian.

The Fourniers argue that presentation of Christian morality entails religious activities such as prayer, that their (religious) viewpoint on the "secular" topic of morality cannot be expressed and promoted without these religious activities, and that forcing them to do so

would prevent them from expressing their point of view, in violation of the First Amendment.

As the Eighth Circuit emphasized, the Supreme Court has "refused to cabin religious speech into a separate excludible speech category; rather, the Court [has] adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of seemingly secular subject matter." Good News/Good Sports Club, 28 F.3d at 1506-07. This insight has particular force where the "seemingly secular subject matter" is morals and character. No one should be surprised if a religious viewpoint on morality looks very like religion itself.

The school district allows use of its facilities by certain groups that focus on "moral development" of young people. The majority argues that the activities of the Club are "quintessentially religious," while the other groups deal only with the "secular subject of morality." Maj. Op. at []. The fallacy of this distinction is that it treats morality as a subject that is secular by nature, which of course it may be or not, depending on one's point of view. Discussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially--quintessentially--religious. "There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading'--all apparently forms of 'speech,' despite their religious subject matter--and become unprotected 'worship.'" Widmar v. Vincent, 454 U.S. 263, 269 n.6, 102 S. Ct. 269, 274 n.6, 70 L. Ed. 2d 440 (1981) (internal citation omitted). Because the Club's focus appears to be on teaching lessons for the living of a morally fit life, and not on worship, I believe that the Club's message is in fact the "teach[ing of] morals from

a religious perspective," Maj. Op. at [].

Even if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-permissible content, we should err on the side of free speech. The concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum.

* * *

Whenever public officials, in executing the school's access policy, evaluate private speech "to discern [its] underlying philosophic assumptions respecting religious theory and belief," the result is "a denial of the right of free speech." Rosenberger, 515 U.S. at 845, 115 S. Ct. at 2525. I would reverse the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

DC: NDNY
DC Docket: 97-cv-302
DC Judge: SHARPE

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of March, two thousand.

The Good News Club, Andrea Fournier and Darleen Fournier,

Plaintiffs-Appellants,

v. Dkt No: 98-9494
Milford Central School,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants The Good News Club, Andrea Fournier and Darleen Fournier

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc

has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN
B.MACKECHNIE, Clerk

By: - s -
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

THE GOOD NEWS CLUB, ANDREA FOURNIER, and DARLEEN FOURNIER, Plaintiffs,

-vs-

MILFORD CENTRAL SCHOOL, Defendant.

97-CV-0302

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

21 F. Supp. 2d 147

October 23, 1998, Decided
October 23, 1998, Filed

COUNSEL: Thomas Marcelle, Esq., OFFICE OF THOMAS MARCELLE, Slingerlands, New York, For Plaintiffs.

Frank W. Miller, Esq., FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., East Syracuse, New York, For Defendant.

JUDGES: Hon. Thomas J. McAvoy, Chief U.S. District Judge.

MEMORANDUM-DECISION & ORDER

McAVOY, CHIEF JUDGE:

Plaintiffs Good News Club ("Good News" or the "Club"), Andrea Fournier, and Darleen Fournier brought this action pursuant to 42 U.S.C. § 1983, alleging, inter alia, that defendant Milford Central School ("MCS" or "defendant") violated their free speech rights under the First Amendment to the United States Constitution by

denying them the use of the MCS cafeteria. On April 14, 1997, this Court preliminarily enjoined defendant from denying plaintiffs use of the cafeteria during non-school hours. Defendant now moves for summary judgment dismissing the Complaint. Plaintiffs cross-move for summary judgment on their free speech and equal protection claims.

I. Background

A. Facts

Good News is an unincorporated community-based Christian youth organization open to children between the ages of six and twelve. Although the Club is nondenominational, its stated purpose is to instruct children in family values and morals from a Christian perspective. The Club meets weekly for one hour and a typical meeting includes an opening prayer, singing of Christian songs, memorization, recital, and discussion of Biblical verses and scripture, and a closing prayer.

The Club is affiliated with Child Evangelism Fellowship ("CEF"), a Christian missionary organization that oversees and provides support to the Good News clubs throughout the country. n1 This support includes providing teaching materials, prayer booklets (the "Daily Bread"), and training, in return for which the Clubs pay a fee. Additionally, CEF provides "prayer support" for the instructors of the various Good News clubs. Defendant Darleen Fournier is in charge of the Club, defendant Andrea Fournier is a Good News member, and Steven Fourier, not named in the above matter, is a pastor and instructor at Good News.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n1 Tellingly, the Club's teacher, Steven Fournier defines

evangelism as "introducing children to Jesus Christ," and "fellowship" as "meeting downstairs in the church and having dinner." Dep. of Steven Fournier, at 48.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - -

The Club previously met at the Milford Center Community Bible Church where Steven Fournier was pastor. Children were transported to these meetings by either a bus provided by MCS, or privately by parents. After MCS decided to no longer provide transportation, plaintiffs sought use of MCS's facilities to hold their meetings. On September 22, 1996, plaintiffs submitted a formal request to use the MCS cafeteria from 3 p.m. to 4 p.m. to conduct its weekly meetings. On October 3, 1996, plaintiffs' request was formally denied in a letter by Superintendent Robert McGruder ("McGruder") on the grounds that the Milford Central School District (the "District") believed that the Club's activities constituted religious worship and instruction, which is prohibited under section 414 of the New York Education Law n2 and MCS policy. n3

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n2 Section 414 provides for the use of schools and school grounds. It also authorizes local school boards to adopt reasonable regulations for the use of school facilities. Section 414 states that school boards may permit the use of the schoolhouse or school grounds for, *inter alia*, the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

* * *

(c) For holding social, civic and recreational meetings

and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination. . . .

n3 In his October 3, 1996 letter, Superintendent McGruder stated:

> Your group's request to use the school facilities indicated such use would be for the purpose of 'hearing a bible lesson and memorizing scripture.' I understand such proposed use to be the equivalent of religious worship, which is prohibited under [Milford Central School District] policy, rather than the expression of religious views or values on a secular subject matter. To my knowledge, our facilities have not been used in the past by any organization for the purpose of religious worship.

Def. Ex. A, Letter of Robert McGruder, Interim Superintendent, Milford School District, dated October 3, 1996.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

Pursuant to section 414, the MCS District Board of Education adopted the "Community Use of School Facilities Policy" ("Community Use Policy") on August 26,

1992. See Def. Ex. 3. The Community Use Policy provides that school facilities may be used by district residents for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public" and consistent with all applicable state laws. Id. The policy further provides that such use must be for nonreligious purposes:

> School premises shall not be used by any individual or organization for religious purposes. Those individuals and/or organizations wishing to use school facilities and/or grounds under this policy shall indicate on a Certificate Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

Id. at 1.

The Community Use Policy lists acceptable and prohibited uses for school facilities, essentially iterating the acceptable and non-acceptable uses provided in New York Education Law § 414. See *supra* note 1.

B. Procedural History

Plaintiffs filed their Complaint on March 7, 1997. The Complaint contains claims under 42 U.S.C. § 1983 for violations of the plaintiffs' free speech rights under the First Amendment and equal protection rights under the Fourteenth Amendment; and a claim under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb et seq. n4 Plaintiffs sought injunctive relief, damages, and attorneys' fees.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n4 RFRA has been declared unconstitutional by the United States Supreme Court. See City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157, 2172 (1997). Accordingly, plaintiffs' RFRA claim is moot. See Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 217 (2d Cir. 1997), cert. denied, U.S. , 140 L. Ed. 2d 670, 118 S. Ct. 1517 (1998).

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - -

Plaintiffs moved for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a), restraining and enjoining defendants from enforcing a ban on plaintiffs' First Amendment right to utilize the school facilities that have, by policy and practice, been made available for public use to other organizations during non-school hours. This Court granted the motion in a bench decision rendered April 14, 1997. Citing to the holdings in Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993), and Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995), this Court noted

> There is no question that the defendant can limit the use of its facilities, and that it need not permit even those uses provided for in § 414 of New York Education Law. However, once it established itself as a limited forum by permitting certain categories of outside uses of its facilities, the State, in the person of the defendant, must respect the lawful boundaries it has itself set.

April 14, 1997 Bench Decision (internal citations omitted). With respect to the question of whether plaintiffs met their burden to show sufficiently serious questions going to the merits to present a fair ground for

litigation, this Court ruled

> In the instant case, the central dispute relates to each sides' understanding of the plaintiff [Good News Club's] meetings. Is the content religious, as alleged by the defendant? Or is the content non-religious, but presented from a religious viewpoint, as alleged by the plaintiffs? . . . . Clearly, this issue presents fair ground for litigation, as it can only be resolved after 'full and complete proof of the nature' of [Good News Club's] programming.

Id. (internal citations omitted).

Defendant now moves for summary judgment dismissing the Complaint. Plaintiffs cross-move for summary judgment on their free speech and equal protection claims. n5

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n5 On September 28, 1998, the parties filed a Joint Stipulation to Remove the Case From the Trial Calendar pending resolution of defendant's motion and plaintiffs' cross-motion for summary judgment.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - -

II. DISCUSSION

A. The Standard for Summary Judgment

The Court will now address defendant's motion for summary judgment.

The standard for summary judgment is well-settled. Under Fed. R. Civ. P. 56(c), if there is "no genuine issue

as to any material fact . . . the moving party is entitled to a judgment as a matter of law . . . where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); see also Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 86 (1996). The moving party bears the initial burden of "informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting FED. R. CIV. P. 56(c)). The initial burden is to demonstrate "that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has met its burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. See Celotex Corp., 477 U.S. at 322; Matsushita, 475 U.S. at 585-86. A dispute regarding a material fact is genuine if a reasonable jury could return a verdict for the non-moving party; that is, whether the non-movant's case, if proved at trial, would be sufficient to survive a motion for judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). When reasonable minds, however, could not differ as to the import of the evidence, then summary judgment is proper. Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849, 116 L. Ed. 2d 117, 112 S. Ct. 152 (1991).

Although the trial court must resolve all ambiguities and draw all inferences in favor of that party against whom summary judgment is sought, Ramseur v. Chase

Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985) cert. denied, 484 U.S. 918, 98 L. Ed. 2d 226, 108 S. Ct. 269 (1987), the motion will not be defeated by a non-movant who raises merely a "metaphysical doubt" concerning the facts or who only offers conjecture or surmise. Delaware & H.R. Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir.1990), cert. denied, 500 U.S. 928, 114 L. Ed. 2d 125, 111 S. Ct. 2041 (1991) (quoting Matsushita, 475 U.S. at 586); see also Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990). Indeed, the nonmoving party's opposition may not rest on mere allegations or denials of the moving party's pleading, but "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

It is with these considerations in mind that the Court addresses defendant's motion for summary judgment.

B. The Freedom of Speech Claim

1. Nature of the Forum

The protections afforded by the First Amendment do not guarantee unlimited access to public property. A school district, like any other property owner, may regulate access to property under its control. See Lamb's Chapel, 508 U.S. at 390; Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). In determining the extent to which the government may limit access to its property, the Supreme Court has adopted a forum analysis that balances the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity. See Cornelius, 473 U.S. at 800; Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 691 (2d Cir. 1991). Accordingly, the right

of access to public property depends upon the character of the property at issue. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); Bronx Household, 127 F.3d at 211 ("Freedom to speak on government property is largely dependent on the nature of the forum in which the speech is delivered."). To this end, the Supreme Court has characterized public property for First Amendment purposes in three ways: (1) the traditional public forum; (2) the designated or limited public forum; and (3) the nonpublic forum. See Cornelius, 473 U.S. at 802; Bronx Household, 127 F.3d at 211.

The Court's first task is to determine the nature of the forum created by the District in MCS's facilities. This requires an examination of the state law and the school policies governing permitted uses of school facilities and whether the District previously opened its property "to entities of a similar character and for the discussion of topics of similar nature." Travis v. Owego-Apalachin Sch. Dist., 1990 U.S. Dist. LEXIS 8492, *17, 1990 WL 94196, at *6 (N.D.N.Y. July 6, 1990) (McAvoy, J.), aff'd, 927 F.2d 688 (2d Cir. 1991).

Generally, courts analyze the State's intent in creating the forum in determining which type of forum exists. See Cornelius, 473 U.S. at 805; Deeper Life Christian Fellowship, Inc. v. Board of Educ. of the City of New York, 852 F.2d 676, 680 (2d Cir. 1988) ("Critical to a finding that the State has created a limited public forum is a determination of the State's intent in establishing the forum.") (citations omitted). New York Education Law § 414 evidences the intent of the legislature to create a limited public forum in its public schools by permitting use of public school buildings by the general public for specific purposes. See NEW YORK EDUC. LAW § 414 (McKinney 1988 & Supp. 1998); see also Deeper Life, 852 F.2d at 680; Travis, 1990 U.S. Dist. LEXIS 8492,

*10, 1990 WL 94196, at *4. Notably, religious worship, instruction, and fundraising is not among these enumerated purposes. See Deeper Life, 852 F.2d at 680 (citing Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (4th Dep't 1978)). Moreover, the Community Use Policy prohibits use of school facilities for "religious purposes." In denying plaintiff's request to use the school cafeteria, Superintendent McGruder stated

> Your group's request to use the school facilities indicated such use would be for the purpose of 'hearing a bible lesson and memorizing scripture.' I understand such proposed use to be the equivalent of religious worship, which is prohibited under [Milford Central School District] policy, rather than the expression of religious views or values on a secular subject. To my knowledge, our facilities have not been used in the past by any organization for the purpose of religious worship.

Def. Ex. A, Letter of Robert McGruder, Interim Superintendent, Milford School District, dated October 3, 1996.

In adopting the Community Use Policy, the District carefully attempted to comply with the requirements in section 414 and the holding in Lamb's Chapel. Thus, "nothing in [the District's] 'official' policies evinces the intent to designate [its] facilities as limited public forums for religious purposes." Liberty Christian Ctr. v. Board of Educ. of the City Sch. Dist. of the City of Watertown, 8 F. Supp. 2d 176, 183 (N.D.N.Y. 1998) (McAvoy, C.J.). While the District's official policies tend to favor a finding of a limited public forum, the "past practice of the [District] in regard to its use of the property at issue [also] is a proper consideration" in determining the type

of forum created. Deeper Life, 852 F.2d at 680; see also Perry, 460 U.S. at 47.

In the present case, the parties agree that MCS is a limited public forum. See Pl. Mem. of Law at 7; Def. Mem. of Law at 7-8, 12. "Limited public forums are 'created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.'" Bronx Household, 127 F.3d at 211 (quoting Cornelius, 473 U.S. at 802). When a state opens a forum to the general public, the state is "bound by the same standards as apply in a traditional public forum." Perry, 460 U.S. at 46. Accordingly, while the First Amendment permits reasonable time, place, and manner regulations, it forbids the state to enforce content-based exclusions unless narrowly drawn to serve a compelling state interest. See id.; Travis, 927 F.2d at 692.

The State "is not required to indefinitely retain the open character" of a limited public forum, however, Perry, 460 U.S. at 46, and an entity such as a school district is entitled, as is a private owner of property, to "preserve the property under its control for the use to which it is dedicated." Lamb's Chapel, 508 U.S. at 390. A state may therefore designate a forum as public "but limit[] the expressive activity to certain kinds of speakers or to the discussion of certain subjects." Travis, 927 F.2d at 692; see also Rosenberger, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created justify the State in reserving it for certain groups or for the discussion of certain topics."); Perry, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access based on the basis of the subject matter and speaker identity."). Such content-based limitations are permissible to the extent that they

preserve the purposes of the limited forum and are viewpoint neutral. Rosenberger, 515 U.S. at 829-30; Lamb's Chapel, 508 U.S. at 393; Bronx Household, 127 F.3d at 211 ("Restrictions on access based on speaker identity and subject matter are permissible only if 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'") (quoting Cornelius, 473 U.S. at 806).

As to those specified uses for which such property is designated a public forum, the same First Amendment protections accorded traditional public forums apply. See Perry, 460 U.S. at 46; Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986). In other words, constitutional protection in a limited public forum is afforded only to "expressive activity of a genre similar to those that government has admitted to the limited public forum." Travis, 927 F.2d at 692 ("The government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."). Therefore, to succeed, plaintiffs must establish that the District's use policies "created a limited public forum intended to benefit . . . organizations such as [Good News] and encompassing the purposes for which the organization seeks to use the school property," Deeper Life, 852 F.2d at 680, and permitted similar organizations to use the school facilities for similar purposes. See Bronx Household, 127 F.3d at 214.

2. Reasonable and Viewpoint Neutral

Where the state has created a limited public forum by permitting access to designated groups, the First Amendment protections afforded to a traditional public forum apply and "the constitutional right of access would . . . extend only to other entities of similar

character." Perry, 460 U.S. at 48; see also Rosenberger, 515 U.S. at 829 ("Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set."); Travis, 927 F.2d at 692 ("Constitutional protection is afforded only to expressive activity of a genre similar to those that the government has admitted to the limited forum."). However, where the speech in question addresses a subject not encompassed within the purpose of the forum, it may be excluded from the forum provided it does not discriminate against speech on the basis of its viewpoint. See Rosenberger, 515 U.S. at 829; Cornelius, 473 U.S. at 806. Therefore, having identified the District's facilities as a limited public forum, the Court must determine whether denying Good News use of the school's facilities was reasonable and viewpoint neutral. See Bronx Household, 127 F.3d at 214; Travis, 927 F.2d at 692.

Plaintiffs do not object to the reasonableness of the District's policy that prohibits the use of MCS's facilities for religious purposes. See Bronx Household, 127 F.3d at 214 (noting that it is reasonable for a school to adopt legislation that denies groups permission to use school facilities for religious purposes). Rather, plaintiffs argue that the Club's activities are secular in nature and similar to other youth organizations, such as the Boy's Scouts, Girl's Scouts, and 4-H Club, that have been permitted to use MCS's facilities; the only difference being that Good News conveys its message "from a Christian perspective by using Bible stories, games, scripture, and religious songs." Pl. Mem. of Law at 8. Accordingly, plaintiffs contend that defendant's policies and practices have created a limited public forum open to a genre of speech that addresses "the moral development of young people." Id. at 7. Defendant, however, argues that the Club's activities are more appropriately classified as religious instruction and worship and are therefore outside the permitted use of

the forum. Plaintiffs, in turn, challenge the defendant's characterization of the Club's activities, arguing that its use falls within the same genre as the other clubs and that defendant's denial of the Club's request constituted viewpoint discrimination, and was therefore unconstitutional. Thus, the Court is faced with two tasks: (i) defining Good News' purpose and the genre of its speech; and (ii) determining whether the District permitted groups of a similar genre to use its facilities in the past.

i. What is the genre of Good News' activities?

Because the parties fundamentally disagree on the genre of the Club's speech, and such a characterization is central to the Court's determination, a detailed discussion of the Club's activities is warranted.

A careful analysis of the Club's activities reveals that its subject matter is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under the District's use policies. A typical Club meeting includes an opening prayer, singing of Christian songs, memorization and recital of Biblical verses and scripture for which the children receive prizes, a discussion based on a Bible reading, and a closing prayer. Dep. of Steven Fournier, at 78. Indeed, plaintiffs own description of the Club's activities is characteristic of a classroom-type setting with formal instruction:

> The Club opens its session with Ms. [Darleen] Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains

> how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

Def. Ex. D, Letter of Thomas Marcelle, dated January 17, 1997.

The Good News Club is comprised of approximately twenty children, ranging from kindergarten to junior high school students. Plaintiffs argue that the Club differs from other children's organizations in that it teaches morals and values from a Christian perspective. See Dep. of Steven Fournier, at 13. Steven Fournier, the Club's teacher, describes Good News' activities as "religious in nature," but distinct from religious worship. See id. at 67. He goes on to describe the Club's activities as

> [Of] a religious nature [in] that religion is, you know, just an acceptance of a set of standards, of a set of beliefs. . . . [The Club] teaches moral values from a Christian perspective . . . [made] meaningful . . . [by] the fact that you need a relationship with Christ to fulfill [these values] the way God would have you fulfill them.

Id. at 69.

Central to this "perspective" is the children's acceptance of Jesus Christ into their lives. See Dep. of Steven Fournier, at 32 (defining the "Christian perspective" as "accepting Jesus Christ as their Savior"); Dep. of Darleen Fournier, at 136 ("Christian perspective is that you need the Lord Jesus to help you to be able to give you the power actually to live a moral life."). This message is conveyed to the children during their lesson:

> Because we are teaching morals from a Christian perspective, we would present that perspective, which is that these morals or these values are senseless without Christ, [that is] to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy or overcome the desire to do bad things to those who have somehow hurt you.

Dep. of Steven Fournier, at 34 (emphasis added).

Notably, the name of the club is derived from the Bible, "where the 'good news' [was] that Christ, according to the Scriptures, died for our sins, was buried and on the third day rose again." Id. at 24-25.

Each Good News Club has a teacher and formal lesson materials which are used to instruct the Club members. For example, each teacher is provided with a booklet called The Daily Bread n6 which is provided to the children, and contains excerpts from the Bible that are part of the reading materials used to instruct the children. See Dep. of Steven Fournier, at 111. An examination of one such Daily Bread booklet, entitled Marantha ("Our Lord is Coming"), is instructive of the Club's purpose. In this particular booklet, Marantha is the "password," and each section of the lesson conveys a message tied to a key word or phrase found in the Bible. During this lesson, children are instructed that

> The Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him. . . . If you have received the Lord Jesus as your Saviour from sin,

you belong to God's special group-His family. . . . After the Lord Jesus grew to be a man, He told people He would die and rise again. When He was nailed to a cross where He died, many people did not understand how He could be the Saviour. . . . Suddenly He rose up into the air and disappeared! . . . Ever since that time, those who have received the Lord Jesus have been looking for Him. Have you received Him as your Saviour? Are you looking for Him? . . . There is room for every one in [Heaven] who receives the Lord Jesus as Saviour from sin. Have you received Him? Are you looking forward to moving to the Father's house in Heaven? . . . How wonderful it will be to be with the Lord Jesus forever. . . . As you study God's Word, He will show you things He wants you to do in living your life pleasing to Him. Ask Him to show you something you can do for Him today. . . . If you obey God, you'll not be ashamed when the Lord Jesus comes. . . . Remember our mystery word . . . resurrection. Just as the Lord Jesus rose again from the dead, those who believe in Him will also be raised from their graves. If you should die before the Lord Jesus comes again, your body will be placed in a grave. But when he gives the signal, your body will be raised from the grave; it will be changed into a body like that of the Lord Jesus; and you will be caught up to meet Him in the air. . . . You will be with Him. . . . Someday, if the Lord Jesus does not come . . . you will die. . . . Our bodies will be placed in graves. When the Lord Jesus gives the signal, all the believers who have died will be raised, alive again. They will have new bodies. . . . Those who are still living will also be given new bodies like the body of the Lord Jesus so that we may travel with Him. . . . Our new bodies will be just like Jesus' resurrection body.

. . . The best thing about Heaven is that we will be with Lord Jesus forever. . . . Someday the Lord Jesus is going to judge all things you have done. He will decide if you have earned any rewards. The place where the Lord Jesus will do this is called the judgment seat of Christ. Every believer will have to appear before the judgment seat of Christ to give an account. . . . If we do what pleases the Lord Jesus, we will receive an honor . . . . When you tell someone of the Lord Jesus and he receives Him as Saviour from sin, both of you are made glad. If a person does not receive the Lord Jesus as Saviour, he will not be able to go to Heaven. Marantha ("Our Lord is Coming") would not be a happy saying for him. . . . You can encourage other boys and girls to go to Sunday school or Good News Club.

Def. Ex. E (Excerpts from Daily Bread For Boys and Girls No. 8, Marantha) (emphasis added).

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

n6 This is described as a "devotional booklet" intended to provide daily "spiritual nourishment" to the children. Dep. of Steven Fournier, at 107, 08. The phrase itself "appears in the Lord's Prayer." Id. at 108.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

The theme of the lesson presented by the teacher is also characteristic of religious instruction. For example, concepts such as temptation, obedience, jealousy, and punishment are explained to the children by relating them to specific passages and verses in the Bible, and encouraging the children to "believe in the Lord Jesus as their Savior." Dep. of Steven Fournier at 90. The lesson

materials have "symbols" in the margins that emphasize "God's solution/way," and an "invitation to receive Christ," and instruct the teacher

> [To] lead a child to Christ. . . . Reading the verse from your Bible helps establish that it is God's Word. . . . Encourage children to bring their own Bibles. If many children have their Bibles, take time to help them look up their verse. . . . Invite children to receive the Lord Jesus . . . . Whenever possible, help children to feel comfortable with God's Word . . . . Encourage children to read a few verses from the Bible each day. . . . Emphasize that this verse is from the Bible, God's Word. This verse is important-and true-because God said it. . . . Be sure to give an opportunity for the "unsaved" children in your class to respond to the Gospel. Don't neglect this responsibility.

Def. Ex. 8 (excerpts from teaching lessons).

During the lesson, the teacher "challenges" the "saved" children, those who already believe in the Lord Jesus as their Savior, to "stop and ask God for the strength and the 'want' . . . to obey Him. Def. Ex. 8. The children are then instructed

> If you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will--we will pray with you separately, individually. . . . And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey Him.

Dep. of Steven Fournier, at 86-87; 94; see also Def. Ex. 8 ("Challenge" section in excerpted teaching materials).

If a child is "unsaved," the teacher "invites" the child to "to trust the Lord Jesus to be your Savior from sin" and "receive[] [him] as your Savior from sin." Def. Ex. 8. The children are then instructed

> If you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life.

See Def. Ex. 8 ("Invitation" section in excerpted teaching materials).

> And then we would give an invitation that if you would like that strength to obey God and you would like to ask Jesus as your personal Lord and Savior, come up and talk with us . . . and we'll pray with you. . . . And also the invitation would be if these children, if they don't know the Lord as their Savior, in order to overcome jealousy or to obey God or whatever value we're speaking of, they would need to ask Jesus into their lives.

Dep. of Steven Fournier, at 90-91.

The "challenge" and "invitation" occur at various times throughout the lesson. See id. at 98. During the lesson, the teacher emphasizes the importance of memorizing Biblical verses by awarding the children prizes or candy for correctly reciting the assigned verse. See Dep. of Steven Fournier, at 25, 39. The children are taught new

verses each week, and are assisted by their teacher in memorizing the verse by "playing a game that helps them to remember that verse, sort of like a drill." Id. Additionally, the children are provided with copies of "memory verse tokens" that contain scripture verses that the children are asked to memorize for the following week's lesson. See id. at 102; 107. Praying is also a regular part of each Club meeting. During these prayers, the children "may at times [pray] . . . to receive Jesus as their personal Savior." Id. at 23. The children are also read "missionary stories" n7 that "spread the gospel" and encourage Bible study. Id. at 38. During these stories there are occasional references to accepting Jesus Christ as the Savior. See id. at 33-34. The children regularly sing songs of a religious nature that make references to God or Jesus Christ. n8 See id. at 34. Notably, none of the children have declined to participate in any of the Club's activities. See id. at 28.

- - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n7
Although this phrase is not clearly defined by the parties, the stories discuss "some part of the world where missionary activity is going on." Dep. of Steven Fournier, at 26. Therefore, these stories likely deal with "person[s] sent by a church . . . into a newly settled region . . . to carry on evangelism." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 917 (1979).
Notably, Steven Fournier, the Club's teacher, and pastor of the Milford Center Community Bible Church, is a "village missionary" who provides "full-time pastoral leadership to small churches in rural area." Id. at 8-9. Prior to his current position, Mr. Fournier was pastor of Montville Union Baptist Church. See id. at 8.

n8 For example, the lyrics to one song, "You and Me,"

are

> You and me-you and me, Jesus dies on the cross for you and me. You and me-you and me, Jesus rose from the dead for you and me. You and me-you and me, He is coming back for you and me.

Def. Ex. 8 (excerpted from Club teaching materials).

In other lyrics to Club songs, the children are told

> He is Lord . . . He is risen from the dead and He is Lord. Every knee shall bow, every tongue confess, that Jesus Christ is Lord.

Id.

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -

The Club's activities are characteristic of formal religious instruction, structured in a classroom setting. Each Club has a teacher, uniform lesson plans, and teaching materials. See id. at 84-88. That the Club does not promote any one specific denomination or theology within the Christian faith does not make its activities any less religious in nature. Good News' teaching materials and lessons are oriented toward instilling Christian beliefs in the children. To this end, the children pray, read the Bible, memorize Biblical verses, and sing songs that have religious references. These activities "clearly denote the organization as a religious club," designed to "instill Christian religion and values" in the children. Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501, 1511-12 (8th Cir. 1994) (Bright, J., dissenting), cert. denied, 515 U.S. 1173, 132 L. Ed. 2d 878, 115 S. Ct. 2640 (1995). The emphasis on prayer, memorization, and recitation of

Biblical verses and scripture, and singing of religious songs also are characteristic of worship activities that inculcate Christian religion and values in the children. See Bronx Household, 127 F.3d at 215 (plaintiff describes its proposed church worship services to include "hymn singing . . . Bible reading, Bible preaching, and teaching").

The purpose of Good News is to "pass along Christian faith and morality to the student members of the Club." Good News/Good Sports Club, 859 F. Supp. 1239, 1248 (E.D. Mo. 1993), rev'd, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173, 132 L. Ed. 2d 878, 115 S. Ct. 2640 (1995). The common theme emphasized in each lesson is the importance of having "a relationship with Christ." Dep. of Steven Fournier, at 69. Specifically, the children are "invited" to accept Jesus Christ in their lives or "challenged" to follow God's Word if they already believe in Jesus Christ as their Savior. See id. at 96-100. Accordingly, the Club uses formal religious instruction and prayer to "instill and reinforce Christian faith" in the children. Good News/Good Sports Club, 859 F. Supp. at 1248.

Having defined the genre of Good News' activities as religious instruction, the Court must now examine whether MCS permitted similar organizations of a similar genre to use the school's facilities in the past.

ii. Did the District permit prior use by groups of a similar genre?

The 1992 Community Use Policy created a limited public forum in the District's school facilities. In this regard, the District adopted a neutral policy toward all community groups that does not permit the use of school facilities for religious purposes. The policy is not anti-religious; it is intended to prohibit all outside

groups from using District facilities for religious purposes. As previously noted, "religious purposes" is not included in the enumerated purposes for which a school may be used under N.Y. State Education Law § 414. See Trietley, 409 N.Y.S.2d at 915. The Second Circuit has held this construction of the statute as binding "in the absence of 'other persuasive data that the highest court of the state would decide otherwise.'" Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 83-84 (2d Cir. 1991). "The provision of religious worship, instruction, and fundraising is not among [the enumerated] purposes." Deeper Life, 852 F.2d at 680; see also Bronx Household, 127 F.3d at 210 (dealing with school policy where "no outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school."). This was the same view adopted by MCS. See Dep. of Peter Livshin, Superintendent of Milford Central School, at 7 ("I would interpret [religious purposes] to mean conducting religious services, providing religious instruction or to an extreme, religious indoctrination into a philosophy or a belief."); see also Def. Ex. A, Letter of Robert McGruder, Interim Superintendent of Milford Central School. The District's policy of denying the use of school facilities for "religious purposes" encompasses religious instruction and prayer in its prohibition. Accord Deeper Life, 852 F.2d at 680. Therefore, Good News' proposed use was not for purposes otherwise permitted under the District's Community Use Policy. See Lamb's Chapel, 508 U.S. at 393-94. Furthermore, plaintiffs have not argued nor presented any evidence that the District previously permitted the use of its facilities for religious purposes. Cf. Bronx Household, 127 F.3d at 214. Rather, plaintiffs contend that, because access to MCS's facilities was granted to the Boy Scouts, Girl Scouts, and 4-H Club, Good News must be granted similar access because it deals with the same subject matter--teaching children moral values, but from a

different viewpoint--the Christian perspective.

A comparison of the activities between Good News and the Boys Scouts, Girl Scouts, and 4-H Club, reveals that Good News' activities constitute religious instruction that is conceptually of a different genre than the secular subject matter dealt with by these other clubs. In failing to make this distinction, plaintiffs misunderstand that while a limited forum may be open to certain groups, it may be permissibly closed to other groups whose activities focus on a different subject matter. See Perry, 460 U.S. at 48 ("While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as [Perry Local Educators' Association], which is concerned with the terms and conditions of teacher employment."). An examination of the Boy Scouts, Girl Scouts, and 4-H Club supports this conclusion.

The Boy Scouts is designed to provide "effective character, citizenship, and personal fitness training" for children. Def. Ex. 4 (excerpt from Boy Scouts Web Site). Through a merit system, they encourage children to be "physically, mentally, and emotionally fit"; "a high degree of self reliance"; and to "understand the principles of the American social, economic, and governmental systems." Id. To accomplish these goals, the Boy Scouts "focuses on a vigorous program of outdoor activities" where "Scouts share responsibilities and learn to live with one another" and "learn ecology and practice conservation of nature's resources." Id. While the Boy Scouts teach reverence and a duty to God, it is only a part of its overall purpose which is the personal growth and development of leadership skills. See Good News/Good Sports Club, 859 F. Supp. at 1248 ("Any incidental

reference to God . . . does not convert the secular nature of the [Boy] Scouts into a religious nature.").

The purpose of the Girl Scouts "is to inspire girls with the highest ideals of character, conduct, patriotism, and service [so] that they may become happy and resourceful citizens." Def. Ex. 5 (excerpt from Girl Scout Web Site). The Girl Scouts are "based on ethical values . . . working in partnership with adult volunteers. Its sole purpose is to meet the special needs of girls." Id. The 4-H Club is a youth organization whose purpose is to "enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults." Def. Ex. 6 (excerpts from Cornell University Cooperative Extension 4-H Youth Development system). Similar to the Boy and Girl Scouts, the 4-H Club strives to develop leadership and volunteer skills in the children and values cultural diversity in its membership.

The Club's teacher, Steven Fournier, acknowledged that the Boy and Girl Scouts do not instruct children in religious subjects. See Dep. of Steven Fournier, at 116. Although the Boy Scout members are awarded a badge for "God and Country," the instruction and activities necessary to receive the badge are performed outside the scout meetings, privately by the child and his family. See Good News/Good Sports Club, 859 F. Supp. at 1247; see also Dep. of Steven Fournier, at 114-15.

The Court finds instructive the findings of the district court in Good News/Good Sports Club, in which the district court, following a bench trial, returned a judgment in favor of the defendant. Specifically, the district court found

> The evidence presented at trial supports a finding that the [Girl, Boy, Cub, Tiger Cub, and Brownies] Scouts are primarily a secular

organization engaging in secular activities. The purpose of Scout meetings is for the young persons involved to have fun, to support the ideals of Scouting, education, and reinforcement of moral values. Although Scouts may earn religious badges, those badges are earned at home or in the scout's place of worship.

Scouting activities include camping, woodworking, swimming, non-religious games, and other secular, skill-oriented activity. Other than the single reference to God in the Scout oath, all activity at Scout meetings is of a secular nature. . . . The descriptions of the purpose of Scouting do not include any reference to God or to religion.

> The [Good News] Club, by contrast, was initiated to teach the young members Christian values. Each parent who testified at trial testified to the importance of the religious aspect of the Club and that a purpose of the Club was to pass along Christian faith and morality to the student members of the Club. A typical Club meeting consists of an opening prayer, snack, activity, Bible lesson, and closing prayer. Plaintiff . . . testified in his deposition that he liked the Club because it gave him the opportunity to relate to Christian friends and that it was important to keep the Club going so that others might become Christian.

859 F. Supp. at 1247-48 (citations omitted).

The district court then distinguished the respective nature of the childrens' organizations as follows:

> Although both the [Good News] Club and the Scouting program are concerned with the moral development of youth, the Club is fundamentally a Christian organization, the primary purpose of which is to instill and reinforce Christian faith and values in its members. The Scouts, by contrast, are a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith. Any incidental reference to God or the "Great Master" does not convert the secular nature of the Scouts into a religious nature. The Court, therefore, finds that the [Good News] Club and the Scouts are not of similar nature.

Id. at 1248 (citations omitted). This Court agrees that Good News, as a religious club, is not similarly situated with these other children's organizations that are primarily secular in nature. See Trinity United Methodist Parish v. Board of Educ. of the City of New York, 907 F. Supp. 707, 714 (S.D.N.Y. 1995); Good News/Good Sports Club, 859 F. Supp. at 1248.

Plaintiffs rely heavily on the Supreme Court's holding in Lamb's Chapel to argue that the District's denial of the Club's request to hold their meetings at MCS constituted viewpoint discrimination. However, the facts in Lamb's Chapel are distinguishable from the present case. Accord Good News/Good Sport Club, 28 F.3d at 1511 (Bright, J., dissenting).

In Lamb's Chapel, the Supreme Court held that a church was impermissibly denied access to school facilities to present "a film series dealing with family and child-rearing issues faced by parents today." Lamb's Chapel, 508 U.S. at 387. The film series discussed the views of a licensed psychologist and clinical professor of pediatrics on "the undermining influences of the media that could be counterbalanced by returning to

traditional Christian family values." n9 Id. at 388. In holding that plaintiff was impermissibly denied use of the school district's facilities, the Court noted

> The critical question [is] whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

Id. at 393.

----------Footnotes----------

n9 The series presented six films titled, "A Father Looks Back"; "Power in Parenting: The Young Child"; "Power in Parenting: The Adolescent"; "The Family Under Fire"; "Overcoming a Painful Childhood"; and "The Heritage." Lamb's Chapel, 508 U.S. at 389 n.3. These films examine the family unit and the use of traditional values to strengthen parent-child relationships. See id.

----------End Footnotes----------

The Court then held

> The film series involved here no doubt dealt with a subject otherwise permissible under [the school use policies] and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.

Id. at 394.

Here, in contrast, Good News is a religious youth organization whose proposed use deals specifically with religious subject matter--and not, as plaintiffs contend,

merely a religious perspective on secular subject matter. Thus, Good News' proposed use and religious subject matter place it in a different genre than the Boy Scouts, Girl Scouts, and 4-H Club. There is considerable difference between the formal religious instruction and prayer offered by Good News and a film series which focuses on strengthening family relationships. While the Club is concerned with developing the moral values of its members, the dominant theme of a Good News meeting is religious instruction and prayer. Thus, the Club's proposed use is not sufficiently similar to the prior uses of MCS's facilities permitted by the District. The District's prohibition was based on the general subject matter--religious instruction and prayer, and not on a particular perspective or viewpoint on a subject otherwise within the forum's limitations. See Rosenberger, 515 U.S. at 830; Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1279 (10th Cir.), cert. denied, 519 U.S. 949, 136 L. Ed. 2d 251, 117 S. Ct. 360 (1996). Accordingly, the District's denial of Good News' request to use MCS's facilities was consistent with its prior practice and use and thus constitutionally sound. Because the Court finds that defendant has not violated the plaintiffs' First Amendment right of free speech, it need not consider whether the defendant's actions were necessary to comply with the constitutional prohibition against state establishment of religion. See Rosenberger, 115 S. Ct. at 2520; Church on the Rock, 84 F.3d at 1280.

C. The Equal Protection Claim

Under the Equal Protection Clause, "a governmental entity may not 'legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. . . . All persons similarly circumstanced shall be treated alike.'" Trinity United

Methodist Parish, 907 F. Supp. at 719 (quoting Reed v. Reed, 404 U.S. 71, 75-76, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971) (citations omitted)). However, "there is no fundamental right of freedom of speech in a limited forum from which various types of speakers and subjects are properly excluded." Bronx Household, 127 F.3d at 217.

In the present case, the District has permissibly made a distinction between clubs whose purpose and subject matter are substantially dissimilar in nature. The District's Community Use Policy is consistent with New York Education Law § 414, and recognizes that it may properly exclude clubs with a religious purpose provided such exclusion is reasonable and viewpoint neutral. See Lamb's Chapel, 508 U.S. at 393. As previously discussed, Good News conducts religious instruction and prayer. The Club has a religious purpose -- evidenced by its focus on memorization and recital of Biblical verses, singing of religious songs, Bible reading, and prayer. This places the Club in a different genre than the Boy Scouts, Girl Scouts, and 4-H Club. Accordingly, the District's Community Use Policy as applied, did not deny the plaintiffs equal protection of the law. Accord Trinity United Methodist Parish, 907 F. Supp. at 719.

III. CONCLUSION:

For all of the foregoing reasons, it is hereby **ORDERED,**

that the preliminary injunction is **VACATED**, and it is further **ORDERED,**

that defendant's motion for summary judgment seeking to dismiss the Complaint is **GRANTED,** and it is further

ORDERED, that plaintiffs' cross-motion for summary

judgment is **DENIED.**

IT IS SO ORDERED.

October 23, 1998
at Binghamton, New York

Hon. Thomas J. McAvoy

Chief U.S. District Judge

Policy of the Milford Central School

Community Use of School Facilities

The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes:

1. For the purpose of instruction in any branch of education, learning or the arts.

2. For public library purposes, subject to the provisions of the education law.

3. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.

4. For meetings, entertainment events and occasions where admissions fees are to be charged when the proceeds of those meetings and events are to be expended for an educational or charitable purpose. However, the use of facilities and grounds are not to be permitted if these meetings, entertainment events and other occasions are under the exclusive control and the proceeds are to be applied for the benefit of a society, association, or organization, or religious sect or denomination, or of a fraternal, secret or exclusive society or organization, other then organizations of veterans of the military, naval and marine service of the United States, and organizations of volunteer firefighters or volunteer into its workers.

5. For recreation, physical training in athletics, including competitive athletic contest of children attending a private, non-profit school.

6. For the provision of child care services during nonschool hours provided that cost of care shall not be a school district charge but shall be paid by the person or persons responsible for the support of the child. The local social services is authorized by law or by any other public or private voluntary source or any combination thereof. [sic]

7. For graduation exercises held by not for profit elementary and secondary schools provided, how ever, that no religious exercises, prayer or religious services are performed in connection in this use.

Use for Nonreligious Purpose. School premises shall not be used by any individual or organization for religious purposes. (Emphasis in original). Those individuals and or organizations wishing to use the school facilities and or grounds under this policy shall indicate on a Certificate Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

Insurance. Individuals or organizations requesting the use of school facilities and/or school grounds may need to submit a Certificate of Insurance providing personal injury and property damage coverage in an amount not less than five hundred thousand dollars ($500,000). (Emphasis in the original). The Superintendent will determine on in individual basis if a certificate is necessary.

Charges. In connection with any request to use school facilities or school grounds, except as stated herein, all organizations and individuals wishing to use school facilities or school grounds will be charged established fees for the use of such facilities or grounds, to be determined in by the Superintendent of Schools and approved by the Board of Education. Payment will be made to the superintendent of schools or his designee prior to the vacating of school property.

Use by District Residents. The Board of Education has determined that since the facilities are owned collectively by residents of the Milford Central School District, there will be no charge for the use of school facilities and grounds by District residents unless such use constitutes and added expense to the District. In such case, residents shall be required to pay for such expense. However, regardless of whether or not any fee will be charged for use of District facilities or grounds all individuals or organizations shall be required to furnish the required certificate of insurance to protect the District, as set forth in this policy, and to submit the required Use of the Facilities Request form along with the required Certificate Regarding Use of School Premises form.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

v. 97-CV-0302 (TJM/GLS)
Plaintiffs' Rule 7(f)
Statement

MILFORD CENTRAL SCHOOL

Pursuant to Local Rule 7.1(f), plaintiffs, with respect to their cross motion for summary judgment, maintain that the following are undisputed material facts:

1. The Good News Club (hereinafter "GNC") is anunincorporated association. S.Fournier's aff. ¶1

2. The Good News Club is a youth organization that develops children's moral values by using Bible stories, games, scripture, and songs, (Exhibit 2[1], Exhibit 3, and D.Fournier's aff. ¶6 at p.16[2]), from a Christian perspective. Plaintiffs agree with defendant's statement of undisputed facts ¶14 in that GNC's "orientation" (or perspective) is Christian. S.Fournier's aff. ¶5-7 at p-10.

3 . GNC is non-exclusive and is open to any child between the ages of 6 and 12. D.Fournier's aff. ¶9 at p.16.

4 . GNC neither requires children to be of the Christian faith nor to believe in God to become a club member. Exhibit 12 at p .27, S.Fournier's aff. ¶42, 44 at p.14.

[1] All exhibits refer to plaintiffs' exhibits unless expressly stated to the contrary.
[2] All page references referred to the page in plaintiffs'

Notice of Motion and Rule 7 Statement booklet on which the affidavit referenced appears.

5. GNC does not inquire about the religious background of the children who join or attend club meetings. Exhibit 12 at p.27, S.Fournier's aff. ¶43 at p.14.

6. Parental permission is required to attend GNC meetings. Exhibit 3 at p.2.

7. GNC is not affiliated with, sponsored by, or under the control of any church. Exhibit 12 at p-51, S.Fournier's aff.¶37 at p.14.

8. GNC neither teaches nor promotes any particular Christian sect's doctrine or theology; GNC does not instruct about the differences of theology among the Catholic sects, among the Protestant sects, or between Catholic and Protestant sects; GNC does not instruct in theology; and GNC neither teaches nor catechizes tenets of a faith. S.Fournier's aff. ¶38-40 at p.14, D.Fournier's aff. ¶ll at p.16.

9. GNC is not associated with any public school or governmental agency. D.Fournier's aff. ¶9 at p.21.

10. There are no employees of any public school or any other governmental agency who exercise authority (real or apparent) over the children. D.Fournier's aff. ¶10 at p.21.

11. For the school year 1995-6 and from September 10-16,1996, GNC held their meetings at Milford Community Church.

12. For the school year 1995-6 and from September 10-16,1996 Milford Central School bused the children

from the school to GNC meetings at the church. D.Fournier's aff. ¶5 at p.21

13. On September 16, 1996, plaintiffs were informed by Milford School transportation director, Ken Cough, that the defendant would no longer transport children to GNC meetings or activities. D.Fournier's aff. ¶6 at p.21

14. On or about September 22, 1996, GNC submitted a request to use the Milford School cafeteria every Tuesday during the School year between the hours of 3:00 p.m. to 4:00 p.m. D.Fournier's aff. ¶12 at p.16. Plaintiffs agree with defendant's statement of undisputed facts ¶2.

15. On or about September 22, 1996, defendant's superintendent denied GNC permission to use the building citing GNC's intended religious purposes. Plaintiffs agree with defendant's statement of undisputed facts ¶3.

16. Plaintiffs tried to arrange a meeting with defendant's superintendent, but were rebuffed. Exhibit 12 at p.58-64

17. In the fall of 1996, defendant's school board president offered an alternative meeting place for plaintiffs. Exhibit 12 at p.44,132-3, S.Fournier's aff. ¶18 at p.11.

18. Defendant suggested that GNC could rent a room in the "Historical Society" building and the children could walk to it after class. Exhibit 12 at p.44,132-3, S.Fournier's aff. ¶19 at p.11.

19. This offer was unacceptable because of safety concerns, insufficient funds to rent the room, and the stigma of discrimination. Fournier's aff. ¶20 at p.11

20. Defendant's policy for community use of its school facilities (Exhibit 1) took effect August 26, 1992. Exhibit 1.

21. Defendant, pursuant to its policy, has allowed the Boy Scouts, Girl Scouts, and the 4H Club to use its facilities to conduct their meetings. D.Fournier's aff. ¶17-9 at p.17; Kiser's aff ¶5-8 at p.18; Ra.Lamb's aff.¶l-4 at p.19

22. The primary purpose of these groups described in ¶21 is to teach young people proper habits and values. Exhibit 11 at p.9. See Exhibits 4-6. D.Fournier's aff. ¶17-9 at p.17; Kiser's aff ¶5-8 at p.18; R.Lamb's aff. ml-4 at p.19. Exhibit 10 at p.15-6.

23. The Boy Scouts use the school facilities to recite their oath and to conduct their meetings for the purpose of influencing a boy's character, development and spiritual growth. Exhibit 10 at p.15.

24. Defendant's superintendent has the authority to grant or deny an application for use of the defendant's school by outside community groups or individuals made pursuant to its policy. Exhibit 10 at p.6.

25. Defendant's superintendent has the authority to interpret the policy. Exhibit 10 at p.6-7.

26. Defendant's superintendent has interpreted its policy to allow a political debate between two candidates for public office. Exhibit 10 at p-9.

27. Defendant's superintendent has interpreted its policy to allow an outside group to use the school to put on a Christmas concert comprised mainly of Christian choir music and Christian songs. Exhibit 10 at p.12.

28. Defendant's superintendent has interpreted its policy to allow an outside group to show the film "The Ten Commandments." Exhibit 10 at p.13.

29. Defendant's superintendent has interpreted its policy to allow an outside group or individual to teach that human kind was created by God as literally described in the Book of Genesis. Exhibit 10 at p.19.

30. Defendant's superintendent has interpreted its policy to allow an outside group or individual to teach moral values as contained in literature like Aesop's Fables. Exhibit 10 at p.l6-7.

31. Plaintiffs do not allege any such events as describe in 826 - ¶30 have taken place on school grounds, only that such would be allowed to take place on school grounds pursuant to defendant's policy.

32. GNC requested to use the cafeteria. Exhibit 2.

33. Milford Central School building contains grades k-12. S.Fournier's aff. ¶47 at p.14.

34. Defendant assigned GNC to room 119. Id. ¶49 at p.14.

Dated: July 29, 1998

- s -

Thomas Marcelle
Bar Roll No. 102117
Attorney for the Plaintiff
71 Devonshire Drive
Slingerlands, New York 12159
Phone: (518) 475-0806

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

Plaintiffs,

STATEMENT PURSUANT TO RULE 7(f)

v.

Civil Action No.: 97-CV-0302 (TJM/GLS)

MILFORD CENTRAL SCHOOL,

Defendants.

The Defendant, Milford Central School District, by its attorneys, Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., as and for its Statement Pursuant to Rule 7(f) of the Rules of the Northern District of New York, allege that the following are material facts as to which there is no genuine issue:

1. The Plaintiffs are principals of a club known as "The Good News Club." They applied to use facilities of the Milford Central School District for purposes of a conducting a program in accordance with a building use request. (Miller Affidavit, Exhibit " 1")

2. In the building use request form, the Plaintiffs indicated that they would use the building for purposes of conducting a class in teaching moral values from a Christian perspective. The activity included teaching biblical verses and scripture. (Miller Affidavit, Exhibit " 1")

3. The Defendant's Superintendent denied the Plaintiffs permission to use the building for these purposes citing the Plaintiffs' intended use for religious purposes. (Exhibit "2", and Exhibits "H" and "I" thereto)

4. The record evidence in the case establishes that no other instances of religious use of the premises has been claimed or established by the Plaintiffs.

5. The Plaintiffs commenced this action alleging that the Defendant violated Plaintiffs' Constitutional right to Free Speech under the First Amendment; that the Defendant discriminated against the Plaintiffs in violation of their rights under the Equal Protection Clause; and, further, that the Defendant violated the Religious Freedom Restoration Act of 1993. Miller Aflidavit, Exhibit "4", Paragraphs "21", "23" & "25")

6. During the pre-trial discovery phase of this case, the Plaintiffs produced the materials that Plaintiffs use in presenting lessons and holding club meetings. (Miller Affidavit, Exhibit "2", and Exhibit "E" thereto and Exhibit "8")

7. The Plaintiff organization is named "The Good News Club." This name refers to the "good news" of Christ's gospel and the "good news" that salvation is available through belief in Jesus Christ. (Miller Affidavit, Exhibit "9", pgs. 24-25)

8. The Plaintiffs hold regular, weekly sessions with the student members of the Club. Meetings were held previously in a church at which Reverend Stephen Fournier was pastor. (Miller Affidavit, Exhibit "9", p. 15)

9. The Club meetings include the singing of religious songs with repeated reference to God and Jesus Christ. Students are also requested to memorize certain

scriptural verses. Students are given rewards, such as prizes, for correctly memorizing the scriptural verse. (Miller Affidavit, Exhibit "2", and Exhibit "D" thereto)

10. The lessons also include a section known as the "Challenge and Invitation." This is memorialized in the written materials from the Plaintiffs. The challenge is a challenge issued to students who have accepted Christ as their savior to continue to live their lives in accordance with the principles of Christ's teaching. The invitation is an invitation extended to those children who have not yet accepted Christ, but who are invited to do so. (Miller Affidavit, Exhibit "9") pgs. 86-87 and 94-100)

11. The Plaintiffs have conceded that only persons of Christian faith attend these sessions. No children of any other religious persuasion attend these sessions. (Miller Affidavit, Exhibit "9", pgs. 27-28)

12. During the course of the sessions, prizes are given. Many of the prizes are prizes with religious significance, such as pencils emblazoned with the logo "God Loves You." (Miller Affidavit, Exhibit "9", p. 39)

13. The Plaintiffs have also issued a prayer book known as "The Daily Bread." Contained in this book, which is distributed in the class and read in the class, are daily prayers. Students are encouraged and invited to read this book on a daily basis between the various Club meetings. (Miller Affidavit, Exhibit "9", pgs. 107-l 11)

14. The Club materials and the Club orientation is decidedly religious, Christian in orientation and teaching. (Miller Affidavit, Exhibit "8")

15. The Good News Club is an organization which is

sponsored by a Christian missionary organization named "The Child Evangelism Fellowship." (Miller Affidavit, Exhibit "9") p. 47)

16. Reverend Fournier, who teaches the classes, also has testified that he seeks to teach moral values from a Christian perspective. He has also testified that the moral values are meaningless without a belief in Christ. (Miller Affidavit, Exhibit "9", p. 34)

17. There are no issues of fact as to the above-described issues.

18.The Defendant contends that these are the material issues of fact about which there is no dispute.

Dated: July 2, 1998

FERRARA, FIORENZA, LARRISON,
BARRETT & REITZ, P.C.

By: - s -
Bar Roll No.: 102203
Attorneys for Defendant
Office and P.O. Address
5010 Campuswood Drive
East Syracuse, New York
13057
(315) 437-7600
Fax (315) 437-7744

TO: Thomas Marcelle, Esq.
71 Devonshire Drive
Slingerlands, New York 12 159
(518) 475-0806
Fax (518) 475-1083

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

v. 97-CV-0302(TJM/GLS)
Response to defendant's Rule 7(f) Statement

MILFORD CENTRAL SCHOOL

Pursuant to Local Rule 7.1(f), plaintiffs respond to defendant's allegation of undisputed facts as follows:

1. Plaintiffs do not dispute defendant's allegation in ¶1.

2. Plaintiffs do not dispute defendant's allegation in ¶2.

3. Plaintiffs do not dispute defendant's allegation in ¶3.

4. Plaintiffs do not dispute defendant's allegation in ¶4 except that the Boy Scouts have used defendant's premises. Plaintiffs' statement of undisputed facts ¶21 and Exhibit lo at p.15-6.

5. Plaintiffs do not dispute defendant's allegation in ¶5.

6. With respect to defendant's allegation in ¶6, not all the material produced in defendant's Exhibit 2 part E

and Exhibit 8 were used in presenting lessons during club meetings. Some of the materials were distributed to the children as part of the club, but not actually presented to them. In particular, GNC does not teach, read, or present the booklet entitled "Daily Bread" in Club meetings. Exhibit 12 at p.llO-111, S.Fournier's aff. ¶9 at p.11. Daily Breads are distributed to the children for personal use. Id. Material like the "David" flannel graph instructional book (Exhibit 7) are used to present a lesson to the Club. S.Fournier's aff. ¶8 at p.10

7. With respect to defendant's allegation in ¶7, Mr. Fournier's assumptions in his testimony (Exhibit 12 at p.24-5) speak for themselves.

8. Plaintiffs do not dispute defendant's allegation in ¶8, but does note that Mr. Fournier was not involved with the GNC's meetings when they were held at the church. Exhibit 12 at p.14.

9. Plaintiffs do not dispute defendant's allegation in ¶9.

10. With respect to defendant's allegation in ¶10, Mr. Fournier's testimony concerning the challenge and invitation part of the lesson speaks for itself. Exhibit 12 at p.34,91,94-101,69-70,146-7.

11. Plaintiffs dispute defendant's allegation in ¶10. Mr. Fournier testified that any child can join the Good News Club. Exhibit 12 at p.27, In 5-6. Further he testified that no one asks the children what denomination or what faith they practice. Exhibit 12 at p-27 In 7-11. When asked specifically if GNC had children of the Jewish, Muslim, or other faith, Mr. Fournier testified he did not know, not that there were not children of other faiths. Exhibit 12 at p.27 Ln 12-23, p. 28 Ln 1-4.

12. Plaintiffs do not dispute defendant's allegation in ¶12.

13. Plaintiffs do not dispute defendant's allegation in ¶13 that GNC members are invited to read "Daily Bread" booklets on a daily basis. Plaintiffs dispute that "Daily Bread" booklets are read during club meetings. GNC does not teach, read, present, or utilize the booklet entitled "Daily Bread" in Club meetings. Exhibit 12 at p.l10-111, S.Fournier's aff. ¶9 at p.11. Daily Breads are distributed to the children for personal use. Id.

14. With respect to defendant's allegation in ¶14, plaintiffs do not dispute that its viewpoint (or as defendant calls it "orientation") is Christian.

15. With respect to defendant's allegation in ¶15, plaintiffs have no basis to know if the word "missionary" describes "The Child Evangelism Fellowship" ("OF") because nothing in the record so describes CEF. Further plaintiffs' relationship with CEF is described in Exhibit 12 at p.18-21.

16. With respect to defendant's allegation in ¶16, Mr. Fournier's statement contained in Exhibit 12, p.34 speaks for itself.

17. With respect to defendant's allegation in ¶17, plaintiffs disagree with it to the extent described in the preceding paragraphs.

18. With respect to defendant's allegation in ¶18, plaintiffs disagree with it to the extent described in the preceding paragraphs.

Submitted July 29, 1998

- s -

Thomas Marcelle

Bar Roll No. 102117
Attorney for the Plaintiff
71 Devonshire Drive
Slingerlands, New York 12159
Phone: (518) 475-0806

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

v. 97-CV-0302 (TJM/GLS)
Affidavit

MILFORD CENTRAL SCHOOL

AFFIDAVIT OF STEVE FOURNIER

Steve Fournier, being duly sworn deposes and states as follows:

1. I have personal knowledge of the facts and circumstances that give rise to the above captioned action.

2. The Good News Club (hereinafter "GNC") is an unincorporated association.

3. There are 4,242 local Good News Club Chapters across the United States. Exhibit 9.

4. I, along with my wife Darleen, lead the GNC meetings in Milford, New York.

5. The purpose of GNC is to provide a fun setting to teach a moral value from a Christian perspective.

6. GNC teaches such moral values as: do not be jealous, be kind to everyone (even those who mistreat you), and be obedient.

7. The Christian perspective is that in order to apply these moral values one needs to rely on the strength of

God.

8. The stories like the ones in the Flannel Graph book entitled "David" (Exhibit 7) are used to present the moral value.

9. GNC neither teaches, reads, nor presents stories from "Daily Bread." Defendant's Exhibit 2 (part E attached thereto) and defendant's Exhibit 8.

10. GNC, on occasion, has shown "Veggie Tales" video tapes during club meetings.

11. For the school year 1995-6 and from September 10-16, 1996, GNC held its meetings at Milford Center Community Church.

12. I was not involved in these meetings described in ¶11.

13. For the school year 1995-6 and from September 10-16, 1996, Milford Central School bused the children from the school to GNC meetings at the church.

14. Without the bus transportation, children were unable to attend GNC meetings.

15. On or about September 22, 1996, GNC submitted a request to use the Milford School cafeteria every Tuesday during the School year between the hours of 3:00 p.m. to 4:00 p.m. Plaintiff's Exhibit 2.

16. Defendant's then superintendent Dr. McGruder denied this request.

17. My wife and I tried to arrange a meeting with Dr. McGruder, but he was unreceptive to this offer. See Exhibit 12 at p.58-64.

18. In the fall of 1996, defendant's school board president offered an alternative meeting place for plaintiffs.

19. Defendant suggested that GNC could rent a room in the "Historical Society" building and the children could walk to it after class.

20. This offer was unacceptable because of safety concerns, insufficient funds to rent the room, and the stigma of discrimination.

21. On or about February 13, 1997, defendant's counsel made an offer that GNC not use the school until the Second Circuit decided the Bronx Household of Faith appeal. Defendant's Exhibit 2 part "F" attached thereto.

22. This offer was unacceptable for the reason set forth in our counsel's reply. Defendant's Exhibit 3 part "G" attached thereto.

II. GNC meetings are not religious instruction.

23. GNC meetings are not religious instruction.

24. I am an ordained Reverend and the Pastor of Milford Center Community church.

25. I am familiar with and have taught religious instruction classes and "Sunday school."

26. The purpose of religious instruction is to teach students, in an academic environment, about church traditions, sacraments, ordinances, liturgy, and theological imperatives, in order to make them active serving members of the local church and the body of Christ.

27. Unlike religious instruction, GNC does not teach children theological imperatives of any church.

28. Unlike religious instruction, GNC does not teach children about church traditions.

29. Unlike religious instruction, GNC does not teach children about sacraments, ordinances, and the liturgy of any church.

30. Unlike religious instruction, the purpose of GNC is not to make students active serving members of the local church and the body of Christ.

31. A sample story from a GNC meeting, like the story of Saul being jealous of David and Saul throwing a spear at, but missing, David, helps illustrate the differences between religious instruction and GNC meetings.

32. In GNC, when asked why Saul missed David, I told the children it was because he was not wearing his glasses.

33. Such a response would have been inappropriate in a religious instruction class.

34. The appropriate response in a religious instruction class would have been that Saul missed David because God ordained Saul to miss David -- That is, I would have taught the theological concept that God is sovereign over all events at all times.

35. The focus of the GNC meeting described in ¶31 - ¶32 was having fun and learning how to overcome feelings of jealousy.

36. In contrast, the focus of a religious instruction

class would have been the teaching of the theological concept of God's sovereignty.

III. GNC is not associated with nor sponsored by a Church.

37. GNC is not affiliated with, sponsored by, nor under the control of any church.

38. GNC neither teaches nor promotes any particular Christian sect's doctrine or theology.

39. There is no instruction concerning the differences of theology among the Catholic sects, among the Protestant sects, or between Catholic and Protestant sects.

40. GNC neither teaches nor catechizes tenets of a faith.

41. Any child can join GNC.

42. Children are not required to be of the Christian faith.

43. GNC does not inquire about the religious background or faith of any child.

44. GNC membership is not conditioned upon belief in God.

45. GNC membership is neither conditioned upon the acceptance of any statement of faith or theology nor the performance of a religious ritual like baptism.

IV. GNC's room at Milford.

46. GNC requested to use the cafeteria at Milford Central School.

47. Milford Central School building contains the high school, junior high school, and elementary school.

48. All students use the cafeteria.

49. Defendant assigned GNC to room 119.

_____
- s -
Steve Fournier

Sworn to before me this 28th day of July, 1998

_____
- s-
Notary Public

Thomas Marcelle
Notary Public, State of New York
Originally Qualified Albany County
Commission expires May 26,2000
Regis No. 02MA6007593